Supreme Court, U.S.
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No. 08-980

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In The

Supreme Court of the United States

MICHAEL S. WHITNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Supreme Court in *Townsend v. Sain,* established the law that an evidentiary hearing is required by a federal court in a habeas corpus where the facts are in dispute.

Whether the Circuit Court erred by not issuing a Certificate of Appealabilty when Petitioner established by the written embodiment of the Declarations of the effected attorney's – the record – that the facts were in dispute and the record testified the District Court failed to give Petitioner a full and fair evidentiary hearing.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael S. Whitney, respectfully prays that a writ of certiorari issue to review the denial of a Certificate of Appealability by the United States Court of Appeals for the Ninth Circuit. The Circuit Court has rendered a decision concerning an Evidentiary Hearing as instructed in *Townsend v. Sain,* that this Honorable Court has set as the standard and other United States Courts of Appeals cite as the authority that the Ninth Circuit has placed itself in conflict with this Honorable Court and other Circuits by the denial of Michael S. Whitney's Certificate of Appealability.

OPINION BELOW

The opinion of the Court of Appeals, Ninth Circuit, is unpublished but appears in Appendix "A" to this writ as *U.S.A. v. Michael S. Whitney,* Case No. CA 08-56196. The order of the Court of Appeals, Ninth Circuit, Denial of Appellant's Motion for Reconsideration with Suggestion for Rehearing En Banc, appears in Appendix "D" dated November 04, 2009.

The order of United States District Court for the Central District of California, Denying Motion under 28 U.S.C. 2255 to vacate, set aside sentence based on Ineffective Assistance of Counsel, District Court's abuse of discretion and prosecutorial misconduct, appears in Appendix "C" to this writ as *U.S.A. v.*

Michael S. Whitney, Case No. CV 07-0260 DOC. The order of the District Court for the Central District of California, Denial of Certificate of Appealability, appears in Appendix "B" dated May 15, 2008.

JURISDICTION

The judgment of the Court of Appeals was entered on September 03, 2008 and appears in Appendix "A." A timely filed Petition for Rehearing was denied by the United States Court of Appeals, Ninth Circuit on November 04, 2008, and a copy of the order denying rehearing appears at Appendix "C."

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and pursuant to the Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution

Federal Rule of Criminal Procedure Rule 32

Federal Statute 18 U.S.C. 3553(a)

STATEMENT OF THE CASE

The Honorable Gary L. Taylor who presided over Petitioner's criminal case retired from the bench prior to Petitioner's filing of his 28 U.S.C. 2255 Petition. Therefore upon filing of Petitioner's 28 U.S.C. 2255 Petition, the matter was assigned to the Honorable David O. Carter.

Whitney filed the 28 U.S.C. 2255 Petition on March 05, 2007. Although Whitney had completed 43 months of imprisonment and was released June 28, 2007, he is still serving three years of supervised release. Whitney's release did not vacate his 28 U.S.C. 2255 Motion. *See Mujahid v. Daniels,* 413 F.3d 991 (9th Cir. 2005).

Whitney respectfully reminds this Court this Petition is submitted Pro Se that this Court construe this Petition liberally and not hold it to the stringent standards than papers drafted by lawyers. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972).

Background

On March 08, 2000 Whitney was indicted with three codefendants. On March 10, 2000, Petitioner Whitney as instructed by United States Postal Inspector, appeared on his own at United States District Court, Santa Ana, California.

Whitney was processed by the United States Marshals and placed in a cell. Whitney was asked if

he had counsel. Whitney stated he did not. Whitney was informed counsel would be provided. Whitney was hand-cuffed, belly-chained and foot-shackled and brought before a Magistrate Judge. Whitney's liberty was lost once he was placed in holding.

Deputy Federal Public Defender Dean Steward was assigned to represent Whitney under the Statutory authority 18 U.S.C. 3006A(a)(c). *See*: (CR 11, ER 365.) Whitney believed that Mr. Steward was his attorney and Whitney divulged privileged information to Mr. Steward. (ER 365.) During the proceeding while Whitney and Steward were discussing the case, Whitney informed Mr. Steward that he did not qualify for a public defender. Mr. Steward provided names of four attorneys for Whitney to interview. These attorneys included Tom Bienert and David Wiechert. (ER 365.)

On April 10, 2000, Whitney informed Magistrate Judge Nakazato he was representing himself but that he would be retaining Tom Bienert and David Wiechert. (GER 278.) At a January 08, 2001, status conference, all parties agreed to continue the trial to November 13, 2001. (ER 73.) Whitney and the Judge had a colloquy about Whitney retaining counsel. Whitney informed the Judge he fully intended to retain counsel because it's foolish not to have counsel. (RT [1/8/2001] 27; GER 40.) The District Court instructed the Government to monitor the situation concerning Whitney retaining counsel and to schedule a status conference if the situation remained

unresolved in a couple of months. (RT [1/8/2001] 29; GER 61.)

On April 30, 2001, Whitney executed a retainer agreement with Thomas Bienert and David Wiechert. Mr. Bienert's billing records show that at this time, he was actively preparing for trial, conferencing with the Assistant United States Attorney (AUSA), and was retained on an hourly basis. (ER 435.)

At a July 02, 2001, status conference, Attorney Thomas Bienert was present and informed the District Court he had not yet been retained but expected to file an appearance as counsel of record within two weeks. (RT [7/2/2001] 4; GER 48.)

At a July 23, 2001 status conference, Bienert advised the District Court "he had been retained" in order to review the discovery, and if he was retained for trial by September 1st he would be prepared to go to trial on the scheduled trial date, November 13, 2001. (RT [7/23/2001] 5-6; GER 55-56.)

Mr. Bienert's billing records testify on September 01, 2001 he was still retained he continued to prepare for trial. He prepared a trial outline and a trial memorandum. (ER 437.) Mr. Bienert continued to bill Whitney's trust account and conference with the AUSA.

Whitney's co-defendant Hudson's court appointed panel attorney passed away. The judge in chambers on January 08, 2002 appointed panel Attorney Mr. Kenneth M. Miller to represent Hudson. (CR 105,

367.) Whitney's original court appointed counsel Dean Steward, had left the federal public defender's office. The record confirms Mr. Miller was law partners with Whitney's original attorney, Dean Steward. (ER 379.)

Whitney called Mr. Bienert on January 10, 2003. Mr. Bienert told Whitney that he could not represent him at trial scheduled to begin on January 21, 2003 because of a calendar conflict. (ER 379.)

On January 14, 2003, Whitney met with Mr. Bienert at his office. Whitney told him he wanted to move to continue the trial to enable Mr. Bienert time to prepare. (ER 368-369.)

During this meeting, Mr. Bienert told Whitney he wanted to talk to co-defendant Hudson's counsel. Whitney discovered at this time that Hudson's counsel was in the same office as Bienert. After Bienert and co-defendant Hudson's counsel Miller met and Bienert informed Whitney, Miller was prepared to go to trial immediately and did not wish to continue the trial. At this point, Whitney became concerned that Mr. Bienert was more interested in protecting Mr. Hudson's interest than his own. As a result, Whitney no longer felt comfortable with the prospect of being represented at trial by Bienert. (ER 369.) As this was only seven days before the scheduled start of trial, Whitney believed it was too late to retain other counsel. Whitney therefore felt he had no choice but to represent himself at trial. (ER 369.)

On January 21, 2003 Whitney proceeded to a jury trial and made an equivocal waiver of counsel. The

Government suggested the court appoint stand-by counsel for Whitney. The court denied the request because it would take six months for counsel to get acquainted with the case. (RT 1/23/03.) On February 04, 2003, the jury convicted Whitney. The Honorable Gary L. Taylor sentenced Whitney a year and a day later on February 05, 2004. The Ninth Circuit remanded the case pursuant to *United States v. Castro*, 382 F.2d 927 (9th Cir. 2004). Judge Taylor again sentenced Whitney on April 27, 2005.

Michael S. Whitney's, Direct Appeal

After being resentenced Petitioner's, retained appellant counsel, Karyn H. Bucur filed a Notice of Appeal with the Ninth Circuit Court of Appeals.

Petitioner Whitney argued in his appeal the issue of Conflict of Interest of his attorneys, Federal Public Defender Dean Steward, Whitney's retained Counsel Thomas Bienert and David Wiechert and their association with Attorney Kenneth Miller, who later was appointed counsel for co-defendant Hudson. Whitney did not argue nor did he outline *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The applicable law concerning an Ineffective Assistance of Counsel Claim because in the Ninth Circuit as well as Sister Circuits a Claim of Ineffective Assistance of Counsel is barred on direct appeal and is to be raised for the first time in a 28 U.S.C. 2255 Petition.

A successful demonstration of a Conflict of Interest may lead to a cognizable Claim of Ineffective

Assistance of Counsel. In Whitney's appeal he attempted to meet the Conflict of Interest standard the Supreme Court has established in *Cuyler v. Sullivan,* 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980). In *Cuyler v. Sullivan,* the Supreme Court ruled that a defendant can demonstrate a Sixth Amendment violation by showing the following: (1) defense counsel was actively representing conflicting interest and (2) the conflict had an adverse effect on specific aspects of counsel's performance.

The Ninth Circuit Court of Appeals in its memorandum filed on May 12, 2006 AFFIRMED Whitney's Sentence. The Circuit Court addressed Whitney's Claim of Conflict of Interest. *App.79-82.* The Circuit Court addressed two conflicts. (1) That Attorney Steward who made an appearance for Whitney later became partners with Attorney Miller. In turn, Miller later was appointed counsel for co-defendant Hudson. Hudson and Whitney blamed each other, so Whitney contends that the partnership could not represent both without conflict. *Id.81*; and (2) Whitney claims that Bienert, Miller, Steward, and a fourth lawyer, Wiechert were effectively law associates because their offices were adjacent, they shared a paralegal, and they sought to buy a building together. *Id.81.* The Circuit continued and stated "Whitney also identifies no adverse effect on Bienert's representation" and the Circuit Court in a footnote addressed the issue Whitney claimed that the District Court, upon appointing Miller counsel, should have made a F.R.C.P. 44(c) inquiry due to the relationship between Steward and

Miller. The Circuit Court stated Whitney failed to analyze what effect a failure to inquire would have on his Sixth Amendment rights. *App.81.*

Whitney asserts the Circuit Court erred and was misguided when it AFFIRMED Whitney's Sentence. Although the Circuit Court properly set the table for Whitney to file a 28 U.S.C. 2255 Petition and raise the cognizable Claim of Ineffective Assistance of Counsel, the Circuit Court stated Whitney did not demonstrate any adverse effect from Dean Steward representation and Whitney also identifies no adverse effect from Bienert's representation. *App.81.* The Circuit Court properly acknowledged that Bienert in fact had represented Whitney.

Whitney did not argue in his direct appeal the adverse effect he suffered from Bienert's representation because the Ninth Circuit as well as Sister Circuits instruct Ineffective Assistance Claims to be raised for the first time in a 28 U.S.C. 2255 Petition, "so that a record may be developed to show what counsel did and resulting prejudice." *United States v. Simas,* 937 F.2d 459, 463 (9th Cir. 1991).

The Circuit Court erred when it accepted Attorney Dean Steward's declaration made under the penalty of perjury. Attorney Steward's declaration conflicts with Attorney Thomas Bienert's declaration also submitted under the penalty of perjury. The Circuit Court found Steward faced no conflicts at the time he made his appearance for Whitney, because he was not yet associated with Miller. *App.81.*

Attorney Dean Steward declares that in March 2000, he was employed as a Deputy Federal Public Defender for the Central District of California and in April 2000, Steward declares he left the Federal Public Defender's Office and entered private practice. Steward claims he formed a partnership with Kenneth M. Miller. *App.38.*

In direct conflict with Attorney Dean Steward's declaration, Whitney's retained Attorney Thomas Bienert declares that in March 2000, Bienert shared an office with Dean Steward, David Wiechert, and Miller. *App.42.* Attorney Steward had declared in March 2000, he was employed as a Deputy Federal Public Defender and this conflicts with Attorney Bienert's declaration in which Bienert claims in March 2000 Steward shared an office with Bienert. *Id.38-42.*

Whitney was indicted on March 08, 2000, and made his first appearance before the District Court on March 10, 2000. At this appearance Attorney Dean Steward was appointed as the Deputy Federal Public Defender by the Court to represent Whitney. Attorney Bienert declares not only did Steward share an office with Bienert, Wiechert and Miller, but also that they all had individual practices. *Id.42.* Attorney Dean Steward was employed as the Deputy Federal Public Defender in March 2000; therefore he was ethically barred from having his own practice in a shared office with Bienert, Wiechert, and Miller. Furthermore Steward declared he did not enter private practice until April of 2000, and formed a partnership with

Attorney Kenneth Miller. *Id.38.* Steward's declaration conflicts with Bienert's declaration on when they shared an office and Bienert declares he, Steward, Wiechert, and Miller continued to have their own individual practices. According to Steward he did not operate an individual practice; Steward formed a partnership with Miller.

Based upon the declarations made under the penalty of perjury by Attorneys Bienert and Steward the Circuit Court was misguided in finding: "Steward faced no conflicts at the time he made his appearance, because he was not yet associated with Miller." *Id.81.* The attorney declarations are in such conflict, the record does not support the Circuit Court's finding.

Attorney Thomas Bienert in his declaration of September 10, 2003, in the first part he correctly stated, "I understand that Whitney contends that I am law partners with Miller and two other lawyers. This contention is incorrect." *Id.41.* Whitney's contention is well-grounded. Whitney is entitled to an Evidentiary Hearing so that Bienert may explain why he is listed with the California State Bar as associated with Bienert & Miller, or simply stated law partners with Miller. *App.75-76.* The Ninth Circuit holds an Evidentiary Hearing was required when the written embodiment of the court record shows contradictions. *See U.S. v. Arellanes,* 767 F.2d 1353, 1357 (9th Cir. 1985).

Following the teachings in *Arellanes,* the Circuit Court should have remanded Whitney back to the

District Court for an Evidentiary Hearing to resolve the conflict of the written embodiment of the court record concerning the declarations made under the penalty of perjury by Attorneys Thomas Bienert and Dean Steward.

Whitney Files a 28 U.S.C. 2255 Petition

After exhausting all remedies Whitney filed a 2255 Petition with the District Court. Whitney followed the teachings of the Ninth Circuit and Sister Circuits and for the first time raised the cognizable Claim of Ineffective Assistance of Counsel. Whitney properly outlined the applicable law concerning a Claim of Ineffective Assistance of Counsel. Whitney cited *Strickland v. Washington,* 466 U.S. 668 (1984).

Whitney briefed the District Court on the two prongs of *Strickland,* Whitney was burdened with demonstrating, in light of all the circumstances, that: (1) his counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) defendant was prejudiced as a result. *See*: *Strickland v. Washington,* 466 U.S. 668, 687 (1984). When reviewing the first *Strickland* element, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *United States v. Bosch,* 914 F.2d 1239, 1244 (9th Cir. 1990). Whitney continued and cited, " . . . the

reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the challenged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison,* 477 U.S. 365, 381 (1986). Even if defendant demonstrates that his counsel' performance was deficient, he still must carry the second prong of *Strickland,* and show that such deficiency resulted in prejudice to him. To establish prejudice, defendant "must show that there is a reasonable probability that, but counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

Whitney carried the burden of the two prongs of *Strickland,* before the District Court in his 2255 Petition. The Government filed their opposition response on July 02, 2007, with a voluminous attachment of exhibits. Upon review of the Government's Table of Authorities it is noted *Strickland,* is not cited, a check of the Table of Contents, Ineffective Assistance of Counsel is not mentioned. *App.61.*

Whitney had properly filed a 28 U.S.C. 2255 Petition that was grounded upon a cognizable Claim of Ineffective Assistance of Counsel. The Government argued "Whitney may not relitigate his conflict claim because it was already decided on direct review." *App.62.* The Government's argument is unpersuasive, Whitney's 2255 Petition was based on Ineffective Assistance of Counsel, not on a Conflict of Interest. In

any event Whitney argued the Government was incorrect in their position under Supreme Court authority *Price v. Vincent,* 123 S.Ct. 1848, 1852-53 (2003). An issue may be relitigated if a finding is contrary to or an unreasonable application of the Supreme Court's clearly established precedents. *App.62.*

On August 08, 2007 the District Court denied Whitney's 2255 Petition. The court incorrectly stated the case background. The court incorrectly stated Whitney was an owner of the Ostrich Group. *App.11.*

The Ostrich Group was owned and managed by Patrick Antrim and David Hudson from July 1995 through the middle of 1997. (RT 1/22/03 120-121; ER 57-58.) Whitney was retained by the Ostrich Group as an outside consultant in September 1996. (RT 1/24/03 160-165; ER 182-187.) Six months later, Whitney terminated his consulting on April 01, 1997. (RT 1/23/03 94-95; ER 105-106.)

Mr. Edward Gogin testified he was hired as the Ostrich Group's Certified Public Accountant and during his dealings with the Ostrich Group, Mr. Whitney "was never involved in any management decisions." (ER 445.) The ranch owners that dealt with the Ostrich Group testified they had pre-existing relationships or contracts with the Ostrich Group. Some of the ranch owners sold ostriches to the Ostrich Group before Whitney was retained as a consultant. (RT 1/28/03 53-56, 127-135, 161-162, 164-166, 167-181, 191; ER 199-212, 231-236, 249-271; RT 1/29/03 115-120, 209-212; ER 302-307, 338I-338L.)

After Whitney had terminated his consulting on April 01, 1997, Whitney spent several months making himself personally available to the Ostrich Group clients and responding to their concerns. Whitney returned boarding fees he collected to many of the investors. (RT 1/22/03 60; ER 48; RT 1/23/03 21-22, 87-88, 64-65, 96, 78-79; ER 77-78, 98-99, 91A-91B, 92-93, 107; RT 1/24/03 12-13, 29-37; ER 147-148, 149-157.) Prosecution witness Adrian Quezada met with Whitney in the summer of 1997. Quezada said that Mr. Whitney was very cooperative trying to resolve the issue of the Ostrich Group. Whitney retained legal representation to assist the investors to force the Ostrich Group to return the investors' money. (RT 1/23/03 91; ER 102.)

The District Court's Order of Denial of Whitney's 28 U.S.C. 2255, is silent that on April 30, 2001 Whitney executed a retainer agreement with Thomas Bienert and David Wiechert. (ER 435.) The court incorrectly states the record: "The Honorable Gary L. Taylor sentenced Whitney a day later . . . " *App.12-13.* Whitney was sentenced one year and a day later on February 05, 2004. The District Court also failed to mention the Circuit Court set the table for Whitney's 2255 Ineffective Assistance Claim when the Circuit raised the question "Whitney also identifies no adverse effect of Bienert's representation." *Id.81.*

The Circuit Court raised the issue that Whitney identifies no adverse effect of Bienert's representation. The reason why was Whitney argued a *Cuyler* Sixth Amendment Conflict of Interest Claim not a

Strickland Sixth Amendment Ineffective Assistance Claim in his direct appeal. Whitney took the observation of the Circuit Court to heart and raised for the first time the Ineffective Assistance Claim in a 28 U.S.C. 2255 Petition.

Whitney Files with the District Court a Request for Reconsideration, if, not Granted, Construe Request as Certificate of Appealability

Whitney properly and timely filed with the District Court a request for reconsideration, for the District Court to reconsider its Order of Denial of Whitney's 28 U.S.C. 2255 Petition. Whitney asked if the court does not grant Whitney's request for reconsideration. Whitney requests this Court construe this Motion as a Certificate of Appealability. *App.57-74.*

District Court Orders a Denial of Certificate of Appealability

Again the District Court in the Denial of Certificate of Appealability has misstated the background and the record of the case, as the District Court did in the denial of Petitioner's 28 U.S.C. 2255.

The District Court erred when it Denied Whitney's 28 U.S.C. 2255, and erred again when the District Court Denied Whitney's Certificate of Appealability.

Whitney following the Ninth Circuit's teachings in *Simas*, properly raised in his 28 U.S.C. 2255

Petition the cognizable Claim of Ineffective Assistance of Counsel for the first time. The District Court was required to develop the record and hold an Evidentiary Hearing into Whitney's Ineffective Assistance Claim. This precedent is clearly established Federal Law, as determined by the Supreme Court in, *Townsend v. Sain,* 372 U.S. 293 (1963) The Ninth Circuit also holds a Petitioner is entitled to an Evidentiary Hearing if he alleges facts, which, if proven, would entitle him to relief. *See*: *Karis v. Calderon,* 283 F.3d 1117, 1126-27 (9th Cir. 2002) Whitney has met this burden any jurist of reason, reading the written Declarations signed under the Penalty of Perjury by Attorney Dean Steward and Thomas Bienert would see the blatant contradictions. The Ninth Circuit holds an Evidentiary Hearing was required when the written embodiment of the court record shows contradictions. *See*: *U.S. v. Arellanes,* 767 F.2d 1353, 1357 (9th Cir. 1985)

Whitney argues the teachings in *Napue v. Illinois,* 360 U.S. 264, 3 L.Ed.2d 1217 (1959), a prosecutor may not knowingly use false evidence to obtain a conviction. The prosecution solicited the Declarations from Steward and Bienert therefore the false Declarations may not be used to maintain Whitney's conviction. Whitney has pleaded on deaf ears with the District and Circuit Courts an Evidentiary Hearing is required. Whitney cited the Supreme Court properly reversed a District Court's dismissal of a habeas corpus application due to the lower

court's failure to hold an Evidentiary Hearing. *See*: *Townsend v. Sain*, 372 U.S. 293 (1963). *App.26.*

The District Court did not address Whitney's cognizable Claim of Ineffective Assistance of Counsel; the court without authority or notification recharacterized Whitney's Claim as a Conflict of Interest Claim when it denied Whitney's 2255 Petition. *App.11,13.* Once the court recharacterized Whitney's claim, the court then stated Whitney may not relitigate that same issue in a 2255 Petition. The court stated it cannot review Whitney's conflict claim as a result of this procedural bar. *App.13-14.*

Whitney argues (1) the court lacked authority to recharacterize his claim and (2) the Supreme Court holds an issue may be relitigated if a finding is contrary to or an unreasonable application of the Supreme Court's clearly established precedents. *See*: *Price v. Vincent*, 123 S.Ct. 1848, 1852-53 (2003). *App.62.*

Whitney properly raised the issue of Conflict of Interest in his direct appeal; Whitney also properly cited the *Cuyler*, analysis for his Sixth Amendment Conflict of Interest Claim. Whitney again properly applied the correct legal standard in his Claim of Ineffective Assistance of Counsel; Whitney cited and briefed in his 2255, the two-prong *Strickland* test.

The Sixth Amendment right to counsel attaches at critical stages of a criminal prosecution after initiation of adversarial judicial proceedings; this includes, but is not limited to arraignments as a

critical stage. Once the right to counsel attaches and counsel is either provided by the court or the accused exercises his right to counsel of choice, counsel will be held to the Sixth Amendment Standard and must act as a effective advocate.

When Whitney's right to counsel attached and he was hand-cuffed, belly-chained and foot-shackled and his liberty lost on March 10, 2000. Whitney's court appointed, Attorney Dean Steward's later statement in his declaration should shock the entire Federal Bench, "I have never discussed Mr. Whitney's case with him. As a public defender, I had neither the time nor interest to discuss an individual's case if I was not going to represent them." *App.38.*

Attorney Steward was representing Whitney that day in March of 2000. Steward continues in his declaration, "Mr. Whitney asked me to recommend criminal defense attorneys who could represent him, I recommended several criminal defense attorneys." *Id.38.*

Attorney Steward recommended four attorneys, two of them were Tom Bienert and David Wiechert (ER 365), whom Whitney retained and funded a trust account with on April 30, 2001.

Attorney Tom Bienert in his declarations, declares under the penalty of perjury that in March of 2000, Bienert " . . . shared an office with three other lawyers: H. Dean Steward, David Wiechert, and Miller at 34700 Pacific Coast Highway in Capistrano Beach California." *Id.42.*

Attorney Steward declares he became partners with Attorney Miller and the partnership was dissolved in November of 2002. *Id.38,* Attorney Kenneth Miller of Steward & Miller was counsel for Whitney's co-defendant Hudson in November of 2002 since the partnership was dissolved Miller was required under Local Rule 83-2.7 *(Notification of Attorney Change of Name, Address, Firm Association, Telephone Number, Facsimile Number or E-Mail Address.)* within 14 days of the change, notify the Clerk of the Court. If any actions are currently pending, the attorney shall file and serve a copy of the notice upon all opposing parties.

Attorney Bienert in November of 2002 was representing Whitney, Steward & Miller who were also representing Whitney's co-defendant Hudson, Steward claims under the penalty of perjury his partnership with Miller is dissolved in November of 2002. The criminal action was clearly pending in November 2002, Therefore Miller was required to notify, file and serve a copy of the notice upon all opposing parties. The record is void of any notification or compliance with Local Rule 83-2.7.

Whitney's retained counsel Tom Bienert declares Whitney is implying Bienert is a law partner with Kenneth Miller. *App.42.* The California State Bar record testifies Bienert and Miller are associated in the firm of Bienert & Miller. *App.75.* Bienert and Miller both were required to notify and file and serve a copy of the notice upon all opposing parties. The

record again is void of any compliance with Local Rule 83-2.7.

Attorney Bienert was retained by Whitney on April 30, 2001 Bienert prepared a trial outline and a trial memorandum. (ER 437.) Bienert continued to bill Whitney's trust account and conference with the Prosecution as reflected in Bienert's invoice to Whitney on February 07, 2003. *App.37.* On January 10, 2003 Bienert told Whitney that he could not represent him at trial scheduled to begin on January 21, 2003 because of a calendar conflict. (ER 368.) *See*: *Id.37.*

Bienert allowed Whitney to go to trial without the benefit of the prepared trial outline and the prepared memorandum. On February 07, 2003 three days after the jury found Whitney guilty on February 04, 2003 Bienert sent Whitney an Invoice. *App.37.*

The District Court Gave Deficient Consideration of 18 U.S.C. 3553(a) When it Resentenced Whitney. The District Court Erred By Not Considering Whitney's Claim Properly Preserved in his 28 U.S.C. 2255 Petition

The District Court erred in its Denial of Whitney's Certificate of Appealability; " . . . although Petitioner cites two cases issued by the Supreme Court after he filed his 2255 Motion, namely *Gall v. U.S.*, 128 S.Ct. 586 (2007) and *Rita v. U.S.*, 127 S.Ct. 2456 (2007), these cases do not represent a change of law that affects Petitioner's arguments." *App.8.*

When Whitney was resentenced on April 27, 2005, Whitney preserved review of his sentence by addressing the effect on 18 U.S.C. 3742(f) even though 3742(e) was excised. *See*: (RT 4/27/05 p.45 AER 641.) The District Court granted review when the court instructed: "anything about the way in which the sentence has been announced that makes it unlawful." (RT 4/27/05 p. 46-47 AER 642-643.)

When Whitney filed his 28 U.S.C. 2255 Petition Whitney again preserved and advanced the issue by stating:

> "At Whitney's resentencing the District Court took the misguided position, now that, the sentencing Guidelines are advisory the court may sentence by discretion and what the judge believes to be reasonable. The District Court abused its discretion when it vacated the enhancements against Whitney and yet gave Whitney the same sentence of 43 months. The maximum sentence the court was allowed to impose based upon the indictment and the jury finding was 0-6 months."

Whitney continued in his 28 U.S.C. 2255 and stated "if Whitney's conviction is not vacated by this Court *Cunningham*, is implicated and the issue needs to be addressed and held in abeyance until the Supreme Court decides *Claiborne*."[1] (*Claiborne*, was replaced with *Gall*, due to the untimely death of

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[1] *Cunningham v. California*, 127 S.Ct. 856 (2007); *Claiborne v. U.S.*, 06-5618 (U.S. 2007).

Claiborne) and *Rita*. *See*: *Comer v. Stewart,* 312 F.3d 1157, 1158 (9th Cir. 2002). Re: holding proceedings in abeyance pending our decision in a relevant case.

The District Court abused its discretion by denying review of Whitney's preserved issue that the sentencing judge failed to adequately consider the 18 U.S.C. 3553(a) sentencing factors.

Whitney briefed the District Court during his 2255 proceedings with a Motion filed on January 09, 2008 that the sentencing judge was required to consider all seven of the 3553(a) factors to determine and fashion the individualized sentence needed for Whitney. Clearly the *Parsimony Clause* in 18 U.S.C. 3553(a) was not followed in the court's sentencing of Whitney.

Whitney during resentencing raised the issue of sentencing disparity. (RT 4/27/05 p.31 AER 627.) Co-defendant No-4 Loretta Antrim received no jail time, probation for a term of 2 years and restitution in the amount of $837,204.76. Co-defendant No-2 David Hudson who went to trial with Whitney received five years probation no jail time and restitution in the amount of $822,204.76. On August 13, 2004 court docket No. 348 the court ordered the termination of probation/supervised release as to David Hudson III. The court's order of August 13, 2004 reduced Mr. Hudson's probation and supervision from 5 years to 1 year and 2 months. While Whitney was sentenced to 43 months of incarceration 3 years supervised release a fine of $7,000.00, a special assessment of $500.00 and restitution of $576,767.00.

Whitney during resentencing raised the issue of sentencing disparity. (RT 4/27/05 p.31 AER 627.) The court simply stated, "The court has also considered all the factors reflected in the code section 3553." (RT 4/27/05 p.53 AER 649.) The judge failed as required to consider all seven of the 3553(a) factors to determine and fashion the individualized sentence needed for Whitney. Whitney properly preserved his sentencing claims in his 2255 Petition. The District and Circuit Courts were required to review Whitney's claim and consider the legal landscape when Whitney was resentenced on April 27, 2005.

The District Court erred when it did not consider Whitney's Rule 32 Claim in his 2255 Motion. *App. 15.* The U.S. Probation Office prepared a flawed report that violated rule 32. The District Court resentence of Whitney was based on the flawed "PSR" also in violation of 18 U.S.C. 3553(a)(c).

In Whitney's first sentence the court illegally increased Whitney's Guideline from a level 20 to a level 21 based on uninvestigated third party affidavits. The probation department violated their own Guideline publication 107 by recommending a level 21, enhancement. (RT 2/05/04 p.8 AER 552.) AUSA Douglas McCormick informs the court the unverified affidavits were submitted so that bail pending Whitney's appeal would be denied. (RT 2/05/04 p.35 AER 559.) Whitney was sentenced on impermissible factors and Whitney's Sentence was based on clearly erroneous facts that do not comply with 3553(c).

The District Court during resentencing on April 27, 2004 asked counsel, "Is there anything in the presentence investigative report that needs to be litigated today considering its accuracy?" (RT 4/27/05 p.8 AER 604.) Whitney's Sentencing Attorney John Barton responded we do object and began to outline objections. The court simply slammed the door shut and stated, "All right. Thank you. The court is going to adopt the relevant factual information that is set forth in the presentence investigative report." (RT 4/27/05 p.10-11 AER 606-607.) Whitney again was sentenced on impermissible factors and the sentence was based on clearly erroneous facts, the court continued to base the sentence on an improper level 21. The Probation Office as required by Rule 32(c)(1)(ii)(B) was required to investigate and prepare a factual victim impact report so that the District Court could properly order restitution under 18 U.S.C. 3553, provision for restitution 18 U.S.C. 3553(a)(7).

Whitney's sentencing Attorney John Barton at resentencing made it abundantly clear before the court Whitney objects to the loss amount. John Barton stated, "We did object to the loss amount as it applied to Mr. Whitney. We also objected and still do object to that and also object and still do object to the calculation of his role." (RT 4/27/05 p.10 AER 606.)

Whitney claimed a Manifest Injustice by violation of Rule 32. This claim was properly raised in his 2255 Petition. Whitney cited Supreme Court and Ninth Circuit authority a "Failure to resolve factual dispute in Petitioner's presentence report, as required

by Fed. R. Crim. P. 32(c)(3)(D), fundamental defect cognizable under 2255." *See*: *U.S. v. Garfield*, 987 F.2d 1424, 1428 (9th Cir. 1993). *App.67.*

REASONS FOR GRANTING THE WRIT

Whitney's right to counsel attached upon his indictment on March 08, 2000; that is when his Sixth Amendment Right to Counsel attached.

Whitney understood the Ninth Circuit and Sister Circuits barred Ineffective Assistance of Counsel Claims from being raised for the first time on direct appeals. The authority of this position in the Ninth Circuit may be found in *United States v. Simas*, 937 F.2d 459, 463 (9th Cir. 1991).

Whitney was not barred from raising a Conflict of Interest Claim in his direct appeal. An attorney Conflict of Interest may lead to an Ineffective Assistance of Counsel Claim. A Conflict of Interest Claim is viewed through the lens of *Cuyler v. Sullivan*. When considering whether the lawyer's performance was deficient this Claim must be viewed through the *Strickland v. Washington*, lens. Whitney did not argue a Claim of Ineffective Assistance of Counsel during his direct appeal. *Strickland* was not raised until his 28 U.S.C. 2255 Petition.

The Circuit Court erred first of all because the court was provided with the written declarations from Bienert, Steward, and Wiechert; the court

should have noted the conflicting declarations of each attorney.

One of the lynch pins in applying the *Sullivan,* test is the question, should the trial court have known of a possible Conflict of Interest? A close examination of Attorney Steward's declaration reveals he in fact was partners with Whitney's co-defendant Hudson's Attorney Ken Miller, Attorney Steward also claims the partnership was dissolved yet nowhere in the record does it testify Attorney Miller complied with Local Rule 83-2.7 (change of association), the court upon a check of the record would assume (1) the attorney's would have complied with the court Rules and (2) there was no conflict because nothing was filed by the attorneys.

Whitney's retained Counsel Thomas Bienert's declaration cast such a dark shadow over his representation of Whitney an Evidentiary Hearing is required. The possibility of simultaneous representation by Bienert and Miller is very likely and the record needs to be developed. *App.75.*

Whitney properly preserved and his case was not final therefore the Circuit Court was required to address Whitney's Claim of Manifest Injustice as it applies to Rule 32 and that the District Court gave deficient consideration of *Parsimony Clause* in 18 U.S.C. 3553(a).

Whitney has demonstrated by using the written embodiment of the declarations of Steward and Bienert and the State Bar of California; the facts are

in dispute, the federal court in Whitney's habeas corpus Petition was required to hold an Evidentiary Hearing. *Townsend v. Sain,* 372 U.S. 293, 313. A federal Evidentiary Hearing is required unless the trier of fact has after a full hearing reliably found the relevant facts. Whitney was denied an Evidentiary Hearing.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Ninth Circuit in this case. The Ninth Circuit has rendered a decision in conflict with this Honorable Court, found in particular by the teachings in *Townsend v. Sain,* and with other United States Courts of Appeals on the same matter. The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision in order to maintain this Honorable Court's teachings found in *Wheat v. United States,* 486 U.S. 153, 160 (1988): "federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and the legal proceedings appear fair to all who observe them." Therefore, so that the public trust in federal trials may be maintained and the protection of Michael S. Whitney's Sixth Amendment rights. Whitney request his conviction be **Vacated** and the matter remanded back

to the District Court for the proper Evidentiary Hearings.

Dated: January 30, 2009

Respectfully submitted,

MICHAEL S. WHITNEY
Petitioner – Pro Se
8033 El Paseo Grande
La Jolla, CA 92037
858-945-7757

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL SYLVESTER WHITNEY, Defendant-Appellant.	No. 08-56196 D.C. Nos. 8:07-cv-00260-DOC 8:00-cr-00024-DOC-3 Central District of California, Santa Ana ORDER (Filed Sept. 3, 2008)

Before: SCHROEDER and KLEINFELD, Circuit Judges.

Appellant's brief received in this court on July 24, 2008, is construed as a request for a certificate of appealability. So construed, the request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

All outstanding motions and requests are denied as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S WHITNEY PETITIONER v. UNITED STATES OF AMERICA RESPONDENT.	CASE NUMBER SA CV 07-0260 DOC **ORDER RE: CERTIFICATE OF APPEALABILITY** (Filed May 15, 2008)

On 10/3/07, Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is **GRANTED**. The specific issue(s) satisfy §2253(c)(2) as follows:

☒ The Certificate of Appealability is **DENIED** for the following reason(s):

- ☒ There has been no substantial showing of the denial of a constitutional right.
- ☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

☐ The appeal seeks to test the validity of the detention pending removal proceedings.

5/15/08 /s/ David O. Carter
Date United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 07-0260 DOC Date: May 15, 2007
Sentence Imposed Under: SA CR 00-0024 GLT

Title: MICHAEL S. WHITNEY v. UNITED STATES OF AMERICA

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date: _____ Deputy Clerk: _____

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Nancy Boehme Not Present
Courtroom Clerk Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
NONE PRESENT	NONE PRESENT

PROCEEDING (IN CHAMBERS):
DENYING PETITIONER'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING 28 U.S.C. § 2255 PETITION

Before the Court are numerous filings by pro se Petitioner Michael S. Whitney ("Petitioner"), all seeking reconsideration of the Court's Order, issued on August 8, 2007, denying Petitioner's motion under 28 U.S.C. § 2255. The Court construes Petitioner's filings on September 14, 2007, September 28, 2007, October 12, 2007, and January 9, 2008, to be Petitioner's Motion for Reconsideration ("Motion"). After considering Petitioner's filings, the Court hereby DENIES Petitioner's Motion.

I. BACKGROUND

On March 8, 2000, a federal grand jury returned a ten-count indictment against Whitney and three co-defendants. Each of these ten counts pertained to a scheme by which Whitney and his co-defendants owned and operated an entity name [sic] The Ostrich Group ("TOG") that purported to sell, breed, and board breeder ostriches. Despite knowing that TOG did not possess the ostriches it claimed to sell, Whitney invoiced and collected boarding fees from victim-investors in furtherance of this scheme. Government's Excerpts of Records ("GER") 203-04, 227.

Whitney proceeded to a jury trial on counts two through six of the indictment on January 2003. Although Whitney was repeatedly advised for well over a year to retain counsel and he repeatedly expressed that he intended to do so, Whitney never did retain counsel and ultimately represented himself at trial. *See, e.g., id.* at 253 (receiving recommendation of several criminal defense attorneys at March 10, 2000 initial appearance and bail hearing); *id.* at 278 (being advised to retain counsel and telling magistrate judge he would be retaining Tom Bienert and David Wiechert at April 10, 2000 post-indictment arraignment); *id.* at 4-5 (telling court he intended to retain an attorney at May 22, 2000 status conference); *id.* at 24-26 (district court warning that it would not postpone trial for preparation of newly-retained counsel and Whitney explaining he could afford an attorney and knew that representing himself was "foolish" at January 8, 2001 status conference); *id.* at 48-49 (telling court that "I have ever [sic] intention of retaining [Tom Bienert]" at July 2, 2001 status conference); *id.* at 56-64 (district court warning Whitney that if he did not soon retain counsel, it would be difficult to find a new attorney in time for trial and Whitney explaining that he understood at July 23, 2001 status conference); *id.* at 71 (district court stating "The Court has begged and pleaded with you to get Mr. Bienert into this case if you're going to do it," and Whitney replying "I have every intention of bringing [Bienert] in" at October 15, 2001 status conference); *id.* at 113 (Whitney declaring on first day of trial that he had expected to retain Bienert but "I

just simply decided that I would represent myself"). On February 4, 2003, the jury convicted Whitney on all counts. The Honorable Gary L. Taylor sentenced Whitney a day later to 43 months imprisonment, three years supervised release, a $7,500 fine, a $500 special assessment, and $576,767 in restitution. The Ninth Circuit later remanded the case pursuant to *United States v. Castro*, 382 F.2d 927 (9th Cir. 2004), and Judge Taylor again sentenced Whitney to 43 months imprisonment, three years supervised release, a $7,500 fine, a $500 special assessment, and $576,767 in restitution on April 27, 2005.

Whitney filed his § 2255 motion on March 5, 2007, seeking that the Court vacate his sentence. Although he had completed his prison sentence and was released from custody on June 28, 2007, this release did not vacate Whitney's § 2255 motion. *See Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005). The Court denied Whitney's § 2255 motion in an order dated August 8, 2007. Petitioner now seeks reconsideration of the Court's denial of his § 2255 motion.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) "provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *School Dist. No. 1J Multnomah County v. Acands, Inc.*, 5

F.3d 1255, 1263 (9th Cir. 1993) (quoting *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991)).

These grounds are further limited by the Local Rules. Local Rule 7-18 provides that a motion for reconsideration of a decision on any motion may be made only on the following grounds: "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." L.R. 7-18. Finally, the Local Rule states that "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." *Id.*

III. DISCUSSION

Petitioner's Motion repeats numerous arguments that Petitioner has made throughout his direct appeal and his written arguments in support of his § 2255 motion. In addition, Petitioner has not met any grounds that must be met pursuant to Local Rule 7-18 in order to qualify for reconsideration of this Court's August 8, 2007 Order denying Petitioner's motion under 28 U.S.C. § 2255. Accordingly, Petitioner's filings for reconsideration are properly DENIED.

First, Petitioner has not pointed to any facts or law that are materially different from those previously presented to the Court that Petitioner could not have known at the time Petitioner filed his motion under 28 U.S.C. § 2255. In fact, Petitioner generally raises the same arguments and same facts that have previously been rejected both by this Court and the Ninth Circuit Court of Appeals. Petitioner attempts to couch many of these arguments as new arguments, but the crux of the arguments substantially overlaps previous arguments raised. Furthermore, although Petitioner cites two cases issued by the Supreme Court after he filed his § 2255 motion, namely *Gall v. U.S.*, 128 S.Ct. 586 (2007) and *Rita v U.S.*, 127 S.Ct. 2456 (2007), these cases do not represent a change of law that affects Petitioner's arguments. *Rita* and *Gall* deal with presumptions and standards of review to be applied to sentences within and outside the advisory guidelines range. *See Rita,* 127 S.Ct. 2456; *Gall,* 128 S.Ct. 586. These cases do not appear to have relevance to Petitioner's arguments raised in his § 2255 motion that the sentencing judge improperly found judicial facts in order to reach the guideline sentencing range, arguments which have been rejected both by this Court and the Ninth Circuit. Finally, Petitioner has not demonstrated that the Court manifestly failed to consider material facts. Although Petitioner contends that the Court failed to consider certain arguments raised by Petitioner, these arguments are simply variations based on the same material facts considered by the Court.

In light of Petitioner's failure to demonstrate that any of the requirements for reconsideration have been met, the Court hereby DENIES Petitioner's Motion.

IV. DISPOSITION

For the reasons set forth above, Petitioner's Motion for Reconsideration is DENIED. The Clerk shall serve this minute order on all parties to the action.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 07-0260 DOC

Sentence Imposed Under:
SA CR 00-0024 GLT

Date: August 8, 2007

Title: UNITED STATES OF AMERICA v. MICHAEL S. WHITNEY

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date]

Date: _____ Deputy Clerk: _____

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kristee Hopkins	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
NONE PRESENT	NONE PRESENT

PROCEEDING (IN CHAMBERS):
ORDER DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE SENTENCE BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL, DISTRICT COURT'S ABUSE OF DISCRETION AND PROSECUTORIAL MISCONDUCT

Before the Court is a pro se Petitioner Michael S. Whitney's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside Sentence Based on Ineffective Assistance of Counsel, District Court's Abuse of Discretion and Prosecutorial Misconduct ("Motion"). After considering the moving, opposing, and replying papers, the Court hereby DENIES the Motion.

I. BACKGROUND

On March 8, 2000, a federal grand jury returned a ten-count indictment against Whitney and three codefendants. Each of these ten counts pertained to a scheme by which Whitney and his codefendants owned and operated an entity name The Ostrich Group ("TOG") that purported to sell, breed, and board breeder ostriches. Despite knowing that TOG did not possess the ostriches it claimed to sell, Whitney invoiced and collected boarding fees from victim-investors in furtherance of this scheme. Government's Excerpts of Records ("GER") 203-04, 227.

Whitney proceeded to a jury trial on counts two through six of the indictment on January 21, 2003. Although Whitney was repeatedly advised for well

over a year to retain counsel and he repeatedly expressed that he intended to do so, Whitney never did retain counsel and ultimately represented himself at trial. *See, e.g.*, *id.* at 253 (receiving recommendation of several criminal defense attorneys at March 10, 2000 initial appearance and bail hearing); *id.* at 278 (being advised to retain counsel and telling magistrate judge he would be retaining Tom Bienert and David Wiechert at April 10, 2000 post-indictment arraignment); *id.* at 4-5 (telling court he intended to retain an attorney at May 22, 2000 status conference); *id.* at 24-26 (district court warning that it would not postpone trial for preparation of newly-retained counsel and Whitney explaining he could afford an attorney and knew that representing himself was "foolish" at January 8, 2001 status conference); *id.* at 48-49 (telling court that "I have ever [sic] intention of retaining [Tom Bienert]" at July 2, 2001 status conference); *id.* at 56-64 (district court warning Whitney that if he did not soon retain counsel, it would be difficult to find a new attorney in time for trial and Whitney explaining that he understood at July 23, 2001 status conference); *id.* at 71 (district court stating "The Court has begged and pleaded with you to get Mr. Bienert into this case if you're going to do it," and Whitney replying "I have every intention of bringing [Bienert] in" at October 15, 2001 status conference); *id.* at 113 (Whitney declaring on first day of trial that he had expected to retain Bienert but "I just simply decided that I would represent myself"). On February 4, 2003, the jury convicted Whitney on all counts. The Honorable Gary L. Taylor sentenced

Whitney a day later to 43 months imprisonment, three years supervised release, a $7,500 fine, a $500 special assessment, and $576,767 restitution. The Ninth Circuit later remanded the case pursuant to *United States v. Castro*, 382 F.2d 927 (9th Cir. 2004), and Judge Taylor again sentenced Whitney to 43 months imprisonment, three years supervised release, a $7,500 fine, a $500 special assessment, and $576,767 restitution on April 27, 2005.

Whitney filed the instant Motion on March 5, 2007, seeking that the Court vacate his sentence. Although he has completed his prison sentence and was released from custody on June 28, 2007, this release does not vacate Whitney's § 2255 motion. *See Mujahid v. Daniels*, 413 F.3d 991 (9th Cir. 2005).

II. DISCUSSION

In his Motion, Whitney raises five distinct grounds upon which he asserts he is entitled to relief. The Court addresses each of these claims in turn.

A. The Conflict Claim

Whitney first repeats the failed argument that he was denied effective assistance of counsel due to conflicts of interest. The Ninth Circuit considered and rejected this claim, on its merits, in the course of Whitney's direct review. Decl. of Douglas F. McCormick Ex. A. It is black letter law that a defendant who raises an issue on direct review may not relitigate that same

issue in a § 2255 petition. *See United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000); *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985). The Court cannot review Whitney's conflict claim as a result of this procedural bar.

B. The De Facto Prosecution Claim

As a part of its effort to deny Whitney bail pending appeal, the Government obtained information from an attorney named George Chelius regarding various business disputes in which Whitney was involved with some of Chelius's clients. Whitney now asserts that the direct court's failure to inquire into the Government's relationship with Chelius subjected him to prejudice. He claims this prejudice derived from the fact that Chelius once jointly represented a client with the late William Dougherty, who served as counsel for Whitney's codefendant until his untimely death in 2001. In describing this purported taint, Whitney proclaims that Dougherty "would not have tolerated the repugnant contact between Mr. Chelius and the prosecution." Mot. 20-21.

This statement of events presents no plausible claim for relief. The fact that Chelius and Dogherty [sic] once represented a client together is irrelevant and has no connection to Whitney's case. More importantly, their past joint representation in no way subjected Whitney to any prejudice, impeded Dogherty's [sic] ability to represent Whitney's codefendant, or raised a conflict of interest preventing Chelius from

providing information to the Government. This claim is denied.

C. The Rule 32 Claim

Whitney next argues that Judge Taylor violated Rule 32 of the Federal Rule of Criminal Procedure by not addressing Whitney's claim that the Probation Office did not interview him before preparing his presentence report ("PSR"). This argument is meritless, as nothing in Rule 32 requires such an interview. The Federal Rules of Criminal Procedure require only that the Probation Officer "conduct a presentence investigation and submit a report to the court." Fed. R. Crim. P. 32(c)(1)(A). If that Probation Officer elects to interview the defendant, the officer must notify defense counsel and provide the counsel with the opportunity to be present. *Id.* 32(c)(2). Failure to conduct an interview, for whatever reason, is not a violation of these rules.

Even if there was merit to this claim, the Court could not grant Whitney any relief because his Rule 32 Claim is not cognizable in a § 2255 motion. The Ninth Circuit has explained that "nonconstitutional sentencing errors that have not been raised on direct appeal generally may not be reviewed by way of 28 U.S.C. § 2255." *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994); *see also* 28 U.S.C. § 2255 (granting district courts authority to entertain claims that a sentence "was imposed in violation of the Constitution or laws of the United States, or that the

court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack"). This limitation on the Court's jurisdiction includes "computational errors in a [defendant's] presentence report" under the Sentencing Guidelines. *United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996). Whitney's Rule 32 Claim fits this description and is therefore not appropriately considered in a § 2255 motion.

D. The Sixth Amendment Claim

In sentencing Whitney, the district court found judicial facts and applied an advisory guideline range provided under the Sentencing Guidelines. Again repeating a failed argument that he made during direct review and that the Ninth Circuit rejected, Whitney contends that this violates his Sixth Amendment rights. The Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), does not change this result. As was the case with Whitney's Conflict Claim, the Court may not consider this procedurally barred claim.

E. The Prosecutorial Misconduct Claim

Whitney finally accuses the Government of prosecutorial misconduct at his trial by knowingly presenting the purportedly prejurious testimony of witness Doris Trusler. Specifically, Whitney contends that Trusler committed perjury when she testified

that defendant sold an ostrich investment contract to her on August 24, 1996 and that she won a civil judgment against defendant. As he does throughout his Motion, Whitney attempts to support this wild claim with a quixotic recounting of his trial and a gross distortion of the factual record.

Trusler did testify at trial that she recalled buying an ostrich contract with Whitney on August 24, 1996. Whitney posits that this testimony was false because Special Agent Robert Huff offered testimony to the effect that Whitney did not begin working for TOG until September 8, 1996. The problem with this theory is that Huff was not testifying from actual knowledge or even his own personal knowledge, but rather was testifying as to a statement Whitney made during an interview in which he admitted to having started working for TOG on September 8, 1996. This does not give rise to an inference that Trusler committed perjury, particularly given that the Government presented other evidence demonstrating that Whitney sold Trusler an ostrich contract on August 24, 1996.

In contrast, Trusler did not testify at trial that she won a civil judgment against Whitney. Although Whitney claims in his Motion that she did, he provides no citation to the record or support for this claim. This is not surprising given that a review of the trial record reveals that Trusler never even mentioned a civil action against Whitney. Whitney cannot now raise an allegation of perjury based on his own false account of testimony that never occurred.

III. DISPOSITION

For the reasons set forth above, Petitioner's Motion for Reconsideration is DENIED.

The Clerk shall serve this minute order on all parties to the action.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL SYLVESTER WHITNEY, Defendant-Appellant.	No. 08-56196 D.C. Nos. 8:07-cv-00260-DOC 8:00-cr-00024-DOC-3 Central District of California, Santa Ana ORDER (Filed Nov. 4, 2008)

Before: W. FLETCHER and RAWLINSON, Circuit Judges.

Appellant's motion for reconsideration with suggestion for rehearing en banc is denied. *See* 9th Cir. R. 27-10; Gen. Ord. § 6.11 (panel may reject request for en banc hearing on behalf of court).

No further filings shall be accepted in this closed case.

APPENDIX E

CA 08-56196
DC Case No.: CV-07-260-DOC
Sentence imposed under, CR-00-24-GLT-(3)
(Central District of California)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL S. WHITNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RECONSIDERATION
WITH A SUGGESTION FOR
RECONSIDERATION EN BANC

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT COURT JUDGE

Michael S. Whitney
8100 Paseo Del Ocaso
La Jolla, California 92037

858-945-7757
4michaelwhitney@gmail.com

Michael S. Whitney
Pro-Se

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STATEMENT PURSUANT TO FRAP 35(b)

Pursuant to Federal Rule of Appellate Procedure 35(b)(1)(A), petitioner moves for a petition for reconsideration with a suggestion for reconsideration en banc because the panel's decision conflicts with an important decision of the United States Supreme Court and of this Honorable Circuit Court which this petition is addressed and consideration by the full court is therefore necessary to secure and maintain uniformity of this court's decisions with Supreme Court authority. The decisions are: *Strickland -v- Washington, 466 U.S. 668 (1984)*, and *United States -v- Simas, 937 F.2d 459, 463 (9th Cir. 1991)*. The panel's decision was filed on September 03, 2008. (Exhibit "A")

Whitney respectfully reminds this court this petition is submitted Pro-Se that this court construe this petition liberally and not hold it to the stringent standards than papers drafted by lawyers. See *Haines -v- Kerner, 404 U.S. 519, 520 (1972)*.

The Sixth Amendment right to counsel applies to all federal and state criminal prosecutions in which a defendant is accused of a felony. The Sixth Amendment right to counsel attaches at critical stages of a criminal prosecution after the initiation of adversarial judicial proceedings. This Circuit holds right to counsel attaches at indictment. See *U.S. -v- McNeil, 362 F.3d 570, 572 (9th Cir.2004)*.

The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland, 466 U.S. 669.*

The applicable law concerning ineffective assistance of counsel requires Whitney must demonstrate, in light of all the circumstances, that: (1) Whitney's counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) Whitney was prejudiced as a result. *Strickland -v- Washington, 466 U.S. 668, 687 (1984).*

This Circuit as well as sister Circuits instructs Ineffective Assistance Claims to be raised for the first time in 2255 Petitions, "so that a record may be developed to show what counsel did and resulting prejudice." *United States -v- Simas, 937 F2d 459, 463 (9th Cir. 1991).*

Whitney diligently followed this Circuits teachings in *Simas,* and raised for the first time his claim of Ineffective Assistance of Counsel. Whitney from the perspective of a layperson asserting his Sixth Amendment right outlined and argued in his 2255 petition the applicable law concerning ineffective assistance of counsel and the burden of the two prong *Strickland,* test which Whitney is required to carry to prevail in an ineffective assistance claim.

The Government in its response to Whitney's 2255 simply ignored Whitney's claim of Ineffective Assistance of Counsel. The District Court when it denied Whitney's 2255 Petition also failed to address Whitney's Ineffective Assistance of Counsel Claim. Whitney's trial and sentencing District Judge the Honorable Gary Taylor, had retired from the bench when Whitney filed his 2255 Petition. Whitney's 2255 Petition was assigned to the Honorable David O. Carter.

The Honorable David O. Carter correctly allowed Whitney's 2255 Petition to proceed because Whitney's Ineffective Claim was properly raised for the first time in his 2255 Petition. See *Simas*.

An initial 2255 Petition may be dismissed by the district court if it raises claims that were previously decided on direct appeal. An exception to this rule may be made if: (1) the movant relies on newly discovered evidence; or (2) the movant relies on an intervening change in the law, and the new law meets the nonretroactivity rule of *Teague -v- Lane*. Such was not the case for Whitney. The district court properly allowed Whitney's 2255 Petition to proceed because the claim of ineffective assistance of Whitney's retained Counsel Thomas Bienert and David Wiechert was properly raised for the first time as required in Whitney's 2255 Petition. See *Simas*.

The district court was required to develop the record and hold an evidentiary hearing into Whitney's claim of ineffective assistance of his retained Counsel

Thomas Bienert and David Wiechert. See *Townsend -v- Sain.*

The United States Supreme Court properly reversed a district court's dismissal of a habeas corpus application due to the lower courts failure to hold an evidentiary hearing. See *Townsend -v- Sain, 372 U.S. 293 S. Ct. 745, AL. Ed. 2d 770 (1963).*

Whitney's Sixth Amendment right to counsel attached, upon his indictment. Whitney's Sixth Amendment rights were violated by the Ineffective Assistance of his retained counsel. Whitney asserted the Cognizable Claim of Ineffective Assistance of Counsel in his 2255 Petition, this claim is deserving to be heard.

This Date: September 12, 2008

Respectfully Submitted,

/s/ Michael Whitney
Michael S. Whitney
Petitioner/Pro-Se

PETITION FOR RECONSIDERATION WITH A SUGGESTION FOR A PETITION FOR RECONSIDERATION EN BANC

A PETITION FOR RECONSIDERATION SHOULD BE GRANTED BECAUSE WHITNEY'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ATTACHED UPON WHITNEY'S INDICTMENT. THE RECORD CLEARLY TESTIFIES WHITNEY RETAINED THE COUNSEL

OF THOMAS BIENERT AND DAVID WIECHERT. THE DISTRICT COURT PROPERLY SET A BRIEFING SCHEDULE AS TO WHITNEY'S 2255 PETITION WHICH PROPERLY ASSERTED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. FOR REASONS UNKNOWN TO WHITNEY THE DISTRICT COURT AFTER GRANTING REVIEW, THE COURT SIMPLY IGNORED WHITNEY'S SIXTH AMENDMENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides the right to counsel attaches at critical stages of a criminal prosecution after the initiation of adversarial proceedings. This Circuit holds this right attaches at indictment. See *U.S. -v- McNeil, 362 F.3d 570, 572 (9th Cir. 2004).*

On April 30, 2001 Whitney executed a retainer agreement with Attorneys Thomas Bienert and Mr. David Wiechert, at the July 23, 2001 status conference, Mr. Thomas Bienert appeared before the district court Bienert, informed the court "he had been retained". (RT [7/23/2001] 5-6; GER 55-56). Bienert informed the court he would be prepared to go to trial in November, if he was retained by September 1, 2001. (CR 86.) Whitney followed the advice of his retained counsel and remained silent. The court was not concerned that Bienert stated **"he had been retained"** and in the same breath states he is prepared to go to trial in November, if he is retained by September 1, 2001. September 1, 2001 came and Mr. Bienert was still representing (Bienert is retained) and billing Whitney's trust account. Attorney

Bienert's last Invoice to Whitney was after the trial on February 07, 2003. (Exhibit "B" and [ER 442])

From April 30, 2001 Whitney's retained counsel Thomas Bienert had meetings, conferences, and correspondence with the prosecutor's, undertook a "case assessment," devised both a case "strategy" and an "outline," and took other steps in the representation of his client Whitney. (ER 428-443)

As reflected in Exhibit "B". On January 10, 2003, Bienert told Whitney that he could not represent him at trial scheduled to begin on January 21, 2003 because of a calendar conflict. (ER 368)

On January 14, 2003, Whitney met with Bienert at his office. Whitney informed Bienert he wanted to move to continue the trial to enable Bienert time to prepare. (ER 368-369) Whitney resubmits for this Circuits review as Exhibit "C" the declarations made under the penalty of perjury by Attorney H. Dean Steward, Thomas H. Bienert, Jr. and David Wiechert.

Whitney submitted the declarations earlier to this Court in a motion titled; Request This Circuit Court Take Judicial Notice, Recent Ninth Circuit Ruling *Houston V. Schomig No. 06-15523 (July, 2008)* In Particular, Not limited, As it Relates To An Evidentiary Hearing. – Filed by this Court on August 12, 2008.

Whitney argued the written embodiment of the court record showed contradictions of the attorney's declarations. The attorney's declaration also contradicted each others declaration.

Attorney Thomas H. Bienert, Jr. in his declaration States: (Exhibit "C")

Page 1 Line 9 Item 3;

> "I did meet with Whitney on or about January 14, 2003. At that meeting, Whitney told me that his trial was to begin approximately one week later and he wanted to retain me to serve as his trial counsel."

This statement by Bienert in his declaration contradicts the written embodiment of his invoice to Whitney dated February 07, 2003, (Exhibit "B"). Bienert's invoice testifies he was not only in communication with the AUSA'S he also was communicating with Whitney's co defendant's counsel Mr. Ken Miller. Mr. Bienert as Whitney's retained counsel was fully aware of the case status and the upcoming trial date.

Thomas Bienert's invoice also testifies he was retained after September 1, 2001. Bienert's invoice shows Bienert was billing Whitney for preparation for trial. On 11/8/02 and 12/18/02 Bienert had conference with Prosecutor Kenneth Julian. On 1/13/03 Bennert [sic] had a conference with Whitney's co defendant Counsel Ken Miller, concerning trial date and status.

On 01/16/03 Bienert held a conference with Prosecutor Douglas McCormick. This Conference is troubling

in view of the colloquy between the District Court and Douglas McCormick This colloquy took place a year later because Whitney filed a Rule 29 and a Motion for new trial Rule 33 prior to sentencing.

During this colloquy AUSA Douglass [sic] McCormick had full knowledge Whitney was represented by retained Counsel Thomas Bienert post arraignment and prior to trial Bienert's invoice testifies McCormick had a conference with Whitney's retained Counsel Bienert on 1/16/03. McCormick is representing to the Court Whitney was not represented by counsel. See (RT [1/26/2004] 20-23) or Exhibit "D".

The issue; the court was concerned whether or not Whitney was notified of the maximum penalties involved. AUSA McCormick agreed the Court did not notify Whitney of the maximum penalties. McCormick knowingly misrepresented Whitney's status with counsel to the Court.

The following is excerpts from the colloquy found in Exhibit "D"

> THE COURT: I want to be real specific. The one element, the one item, that was not adhered to is the specific advisement of the penalties; correct?
>
> Mr. MCCORMICK: This court never specifically advised.
>
> THE COURT: The answer is that's correct; right?
>
> MR. MCCORMICK: Yes
>
> THE COURT: Okay. This is not rocket science. This is a very simple, very simple progression of

thought here. I just want to make sure we are all on the same page.

It's your understanding, is it not, that that is the one element on that requirement group that the defense is asserting was not there; right?

MR. MCCORMICK: Correct.

THE COURT: Okay. Now is it your understanding that the – That the law requires that the judge say those magic words to a defendant, or can that be met in some other way?

Mr. MCCORMICK: That can be met in some other way.

THE COURT: What examples of other ways can it be met?

MR. MCCORMICK: Well, the 9th Circuit case law states that if the court finds that the record as a whole supports the conclusion that the defendant knowingly and intelligently waived his right to counsel, that the district court need not comply with the preferred procedure which –

THE COURT: What we are dealing with since we are dealing with this one element? The question would be whether the record as a whole shows that either that information was communicated to the defendant, or he already knew in some other way, I presume.

MR. MCCORMICK: I don't think that's correct, your honor. I don't think that it's correct that the record as a whole need show that all three of those elements satisfied. The record as a whole simply needs to show that the defendant

knowingly and intelligently waived his right to counsel.

In other words, the defendant knew he had a right to counsel, knew that by going to trial he was giving up his right to counsel, that he did so intelligently. That is, that he knew what giving up his right to counsel meant.

THE COURT: Well, But isn't one of the requirements of intelligently quote, unquote that he knew what the penalties were.

MR. MCCORMICK: I don't think that's the case, your honor.

THE COURT: Now, let me see if I can find this passage. Hold on just a moment. How is it – Lets just assume for the purpose of argument for just a moment that the court would need to make a finding that the defendant was aware of the penalties. Lets just assume that for a moment.

MR. MCCORMICK: Okay.

THE COURT: In your – in your view does the record show that that was the case? The record doesn't show that the judge specifically said it. Does the record show it in some other way?

MR. MCCORMICK: The trial memorandum from the government does specify that the penalty for the statute with which defendant was charged was five years, and the trial brief also specifies that the defendant faced at trial five counts of that particular offense.

> THE COURT: All right. Now that was a trial memorandum that was furnished to the defendant as his own attorney; correct?
>
> MR. MCCORMICK: Correct.
>
> THE COURT: In addition to that, is there anything else?
>
> MR. MCCORMICK: Your honor, we have attempted to contact Mr. Bienert – And we Did this late last week – To discuss with him whether he had Possibly had any discussions with the defendant now that would require probably us to obtain from the court a waiver of the attorney-client privilege. But that is the only other thing we could think of that is not – We have not fully explored. We checked the transcript from the defendant's post indictment arraignment hearing to determine whether he had been advised At

The declarations made by Steward, Bienert, and Wiechert contradict one another. The colloquy cited above contradicts Attorney Thomas Bienert invoice # 10953.

Mr. McCormick intentionally mislead [sic] the court, the trial memorandum and the trial brief are items provided pre-trial both AUSA'S Mr. Julian and Mr. McCormick were conferencing with Whitney's retained Counsel Thomas Bienert. Mr. McCormick's [sic] was speaking with Whitney's retained Counsel Bienert on January 16, 2003, Whitney did not give an equivocal waiver of counsel until January 21, 2003, the first day of trial. The written embodiment of the record shows contradictions.

This Circuit holds an evidentiary hearing was required when the written embodiment of the court record shows contradictions. See *U.S. -v- Arellanes, 767 F.2d 1353, 2357 (9th Cir. 1985).*

Whitney's Sixth Amendment right to counsel attached after the initiation of adversarial judicial proceedings. This Circuit holds right to counsel attaches at indictment. See *U.S. -v- McNeil.*

The Sixth Amendment right to counsel is the right to effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland, 466 U.S. 669.*

"[T]he reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the challenged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman -v- Morrison, 477 U.S. 365, 381 (1986).*

Thomas Bienert and David Wiechert were retained by Whitney on April 30, 2001 from this date up until the day of the trial when Whitney made an equivocal waiver of counsel. Whitney's retained counsel Bienert's invoices reflect he had meetings conferences, and correspondence with the prosecutor's undertook a "case assessment," devised both a case "strategy" and an "outline," and took other steps in the representation of his client Whitney. (ER 428-443). Mr. Bienert did not provide Whitney with any of the work product for his trial.

Whitney's retained counsel conduct undermined the proper functioning of the adversarial process that Whitney's trial cannot be relied on as having produced a just result. *Strickland.*

Whitney "has shown by the record and can further demonstrate prejudice and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. 694.*

This Circuit Court should grant this petition for reconsideration with a suggestion for reconsideration for reconsideration en banc because the district court failed to consider Whitney's claim of Ineffective Assistance of Counsel and the district court was required to hold an evidentiary hearing.

CONCLUSION

Based on the foregoing, Whitney respectfully requests that this Circuit Court grant his petition for reconsideration or for reconsideration en banc.

September 15, 2008

Respectfully Submitted,

/s/ Michael Whitney
Michael S. Whitney
Petitioner/Pro-Se

EXHIBIT "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL SYLVESTER WHITNEY, Defendant-Appellant.	No. 08-56196 D.C. Nos. 8:07-cv-00260-DOC 8:00-cr-00024-DOC-3 Central District of California, Santa Ana ORDER (Filed Sep. 3, 2008)

Before: SCHROEDER and KLEINFELD, Circuit Judges.

Appellant's brief received in this court on July 24, 2008, is construed as a request for a certificate of appealability. So construed, the request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

All outstanding motions and requests are denied as moot.

EXHIBIT "B"

Law Offices of Thomas H. Bienert, Jr.
34700 Pacific Coast Highway
Suite 205
Capistrano Beach, CA 92624

Invoice submitted to:
Michael Sylvester Whitney
2030 Main Street
Suite 1300
Irvine CA 92614

February 07, 2003

In Reference To: United States v. Patrick L. Antrim et al.,
Case No. SA CR 00-24-GLT

Invoice #10953

Professional Services

	Hrs/Rate	Amount
11/8/02 Conference with K. Julian at USAO	0.10 370.00/hr	37.00
12/13/02 Review fax re Omnigon	0.20 370.00/hr	74.00
12/18/02 Conference with Ken Julian	0.10 370.00/hr	37.00
1/10/03 Conference with client – told him I cann't [sic] represent him	0.40 370.00/hr	148.00
1/13/03 Conference with K. Miller re: trial date, status	0.20 370.00/hr	74.00
1/14/03 Conference with K. Miller; meeting with client	1.00 370.00/hr	370.00
1/16/03 Conference with McCormick	0.10 370.00/hr	37.00
For professional services rendered	2.10	$777.00
Previous balance		$50.00
Balance due		$827.00

EXHIBIT "C"

DECLARATION OF H. DEAN STEWARD

I, H. Dean Steward, declare and state as follows:

1. I am an attorney licensed to practice in the State of California. In March 2000, I was employed as a Deputy Federal Public Defender for the Central District of California.

[2.] I met Michael Whitney in the duty Magistrate Judge's courtroom at some point in the Spring of 2000. As Mr. Whitney did not have counsel, I introduced myself as a Deputy Federal Public Defender. Mr. Whitney informed me that he would be hiring counsel. As such, I made a special appearance for Mr. Whitney at the bail hearing. Mr. Whitney understood that I was not his lawyer and was only standing in for him at the bail hearing.

[3.] I have never discussed Mr. Whitney's case with him. As a public defender, I had neither the time nor interest to discuss an individual's case if I was not going to represent them.

[4.] Mr. Whitney asked me to recommend criminal defense attorneys who could represent him. I recommended several criminal defense attorneys.

[5.] In April of 2000, I left the Federal Public Defender's Office and entered private practice. I formed a partnership with Kenneth M. Miller. In November of 2002, Mr. Miller and I dissolved our

partnership and I continued practicing law as a sole practitioner.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 8-27, 2003, at San Clemente, California.

/s/ H. Dean Steward
H. DEAN STEWARD

DECLARATION OF THOMAS H. BIENERT, JR.

I, Thomas H. Bienert, Jr., declare and state as follows:

1. I am an attorney licensed in the State of California and am admitted to practice before this Court.

2. Assistant United States Attorney Douglas F. McCormick has provided me with a copy of portions of Michael Whitney's declaration relating to my communications with Whitney in January 2003 relating to representation at trial.

3. I did meet with Whitney on or about January 14, 2003. At that meeting, Whitney told me that his trial was to begin approximately one week later and he wanted to retain me to serve as his trial counsel.

4. I told Whitney that in order for me to represent him, two things would have to occur: I would need to be paid an appropriate retainer in advance, and I would need sufficient time to prepare for trial,

which I could not do for a trial occurring the following week. I told Whitney that based on my unusually light calendar at that time I could be ready if a short continuance of two or three weeks was obtained.

5. On the issue of the trial date, I did discuss a possible continuance of the trial date with Whitney. I advised Whitney that I believed Judge Taylor would be extremely disinclined to grant a motion for a continuance of the trial at this late hour, given Judge Taylor's warnings to Whitney that he would not grant a last-minute continuance of the trial if Whitney delayed finding trial counsel. I stressed that I believed it would take a significant reason for continuance to overcome the judge's disinclination.

6. I then asked Whitney whether he had a basis for a continuance, given his knowledge of the court's repeated warnings that it would not continue the trial. Whitney indicated that he believed he was missing documents that he wanted to use in trial preparation. Upon further inquiry, I learned that Whitney was aware that he was missing these documents for at least several months and from their description they appeared to have minimal probative value. I told him that the likelihood of Whitney obtaining a continuance would be greater if Whitney's co-defendant, David A. Hudson III, either joined in his request for or did not object to a continuance.

7. As discussed in more detail below, my office was in the same office suites as the office of counsel for co-defendant Hudson, Kenneth M. Miller. Both

Whitney and I knew from prior meetings at my office that Miller represented co-defendant Hudson. I suggested to Whitney that I speak with Miller about his client's position with respect to a continuance of the January 21, 2003 trial date and Whitney agreed. I then spoke with Miller, who conveyed to me that he would oppose any request for a continuance because his client had waited a long time for trial, he and his client were prepared for trial, and it was not in his client's interest to delay trial. I then informed Whitney of Hudson's objection to a continuance. I told Whitney that in order to have the best chance at a continuance it was imperative that he notify the court and the government of his intent to move for a continuance immediately. I told him he did not need to notify Hudson because I had just done that for him.

Whitney did not retain me that day. He indicated that he intended to proceed with a motion for continuance and would be back in touch with me if he obtained a continuance and thereafter desired to retain me.

9. I understand that Whitney contends that I failed to move for a continuance on his behalf in deference to Miller's wishes to proceed to trial. This is untrue. I failed to move for a continuance because I was not retained by Whitney to represent him.

10. I understand that Whitney contends that I am law partners with Miller and two other lawyers. This contention is incorrect. I entered private practice 1998, when I left the U.S. Attorney's Office and joined

the Newport Beach office of Irell & Manella, LLP. I left Irell & Manella in March 2000 and opened my own law practice, the Law Offices of Thomas H. Bienert, Jr. Since opening my practice; I have been the only attorney in the practice, operating as a sole proprietor. I am not now and have never been law partners with any other lawyer.

11. From March 2000 through March 2003, I shared an office with three other lawyers: H. Dean Steward, David Wiechert, and Miller at 34700 Pacific Coast Highway in Capistrano Beach, California. In March 2003, Steward, Wiechert, Miller, and I purchased a building located at 107 Avenida Miramar in San Clemente, California where we continue to have our individual practices.

12. Although I share an office with these three lawyers and we own a building together, I do not share profits, liabilities, and expenses from the practice of law. From time to time I do jointly represent a client with one or another of these attorneys. We also share expenses related to the ownership of the building and the maintenance of the offices.

13. Implicit in Whitney's declaration is a charge that I colluded with Miller to Whitney's detriment. This is untrue. At no time did I have any discussions with Miller that would have revealed attorney-client privileged information; at no time did I accede to any wishes or desires of Miller; at no time did I do or say anything that compromised any of Whitney's legal rights or defenses. In short, any action I took or did

not take in connection with Whitney had nothing to do with Miller or his client.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 10, 2003, at Santa Ana, California.

/s/ Thomas H. Bienert, Jr.
THOMAS H. BIENERT, JR.

DECLARATION OF DAVID WIECHERT

I, David Wiechert, declare and state as follows:

1. I am an attorney licensed to practice in the State of California. I have specialized in criminal defense since 1987. Since 1994, I have practiced as a sole practitioner.

2. Assistant United States Attorney Douglas F. McCormick has informed me that Michael Whitney has alleged that I represented David A. Hudson III. This allegation is based, according to AUSA McCormick, on Whitney's declaration stating that he saw a box marked "Hudson" in my office sometime in early 2003.

3. I have at no time represented David A. Hudson III. I have never had a box with Hudson's name on it in my office.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 8th, 2003, at ~~Capistrano Beach~~, [San Clemente], California.

/s/ David Wiechert
DAVID WIECHERT

EXHIBIT "D"

United States District Court
for the Central District of California

Honorable Gary L. Taylor
United States District Court Judge

[RT [1/26/2004] 20-23]

[20] MR. MCCORMICK: I'M NOT SURE IT DOES, YOUR HONOR.

THE COURT: I'M NOT SURE IT DOES EITHER, BUT THOSE CASES SEEM TO WANT TO FIND FAULT WITH THE DEFENDANT AS A REASON FOR IMPOSING THE WAIVER ON HIM, DON'T THEY?

MR. MCCORMICK: THOSE ARE THE FACTS THAT THOSE CASES HAVE.

THE COURT: YEAH.

MR. MCCORMICK: AND THE FACTS WE HAVE HERE IS THE DEFENDANT CHOSE, I'M CERTAIN IN NO SMALL TERMS, PROBABLY IN ALMOST ENTIRE TERMS, BECAUSE THIS COURT HAD BEEN SO EXPLICIT WITH HIM ON

SOME OCCASIONS THAT I WILL NOT GRANT YOU A CONTINUANCE IF YOU WAIT UNTIL THE TRIAL DATE AND THEN COME IN AND TELL ME YOU DON'T HAVE COUNSEL.

THE COURT: OKAY. NOW IS IT YOUR UNDERSTANDING FROM THE DEFENDANT'S POSITION ON THIS PARTICULAR POINT THAT THE BASIS FOR THEIR OPINION OR THE BASIS FOR THEIR POSITION, THE LINCHPIN ON WHICH IT HANGS IS THE ISSUE OF WHETHER OR NOT THE DEFENDANT WAS NOTIFIED OF THE MAXIMUM PENALTIES INVOLVED.

MR. MCCORMICK: THE GOVERNMENT CONCEDES. AND IF I WASN'T EXPLICIT ENOUGH IN THE PAPERS –

THE COURT: YOU WERE.

MR. MCCORMICK: – WE CONCEDE THAT THE WHAT I CALL THE BALO FACTORS, BECAUSE I THINK THAT'S ONE OF THE FIRST 9TH CIRCUIT CASES TO RECOGNIZE IT, THE PREFERRED PROCEDURE FOR TAKING A FARETTA WAS NOT REFERRED TO.

[21] THE COURT: I WANT TO BE REAL SPECIFIC. THE ONE ELEMENT, THE ONE ITEM, THAT WAS NOT ADHERED TO IS THE SPECIFIC ADVISEMENT OF THE PENALTIES; CORRECT?

MR. MCCORMICK: THIS COURT NEVER SPECIFICALLY ADVISED.

THE COURT: THE ANSWER IS THAT'S CORRECT; RIGHT?

MR. MCCORMICK: YES.

THE COURT: OKAY. THIS IS NOT ROCKET SCIENCE. THIS IS A VERY SIMPLE, VERY SIMPLE PROGRESSION OF THOUGHT HERE. I JUST WANT TO MAKE SURE WE ARE ALL ON THE SAME PAGE.

IT'S YOUR UNDERSTANDING, IS IT NOT, THAT THAT IS THE ONE ELEMENT ON THAT REQUIREMENT GROUP THAT THE DEFENSE IS ASSERTING WAS NOT THERE; RIGHT?

MR. MCCORMICK: CORRECT.

THE COURT: OKAY. NOW IS IT YOUR UNDERSTANDING THAT THE – THAT THE LAW REQUIRES THAT THE JUDGE SAY THOSE MAGIC WORDS TO A DEFENDANT, OR CAN THAT BE MET IN SOME OTHER WAY?

MR. MCCORMICK: THAT CAN BE MET IN SOME OTHER WAY.

THE COURT: WHAT EXAMPLES OF OTHER WAYS CAN IT BE MET?

MR. MCCORMICK: WELL, THE 9TH CIRCUIT CASE LAW STATES THAT IF THE COURT FINDS THAT THE RECORD AS A WHOLE SUPPORTS THE CONCLUSION THAT THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL, THAT THE

DISTRICT COURT NEED NOT COMPLY WITH THE PREFERRED PROCEDURE WHICH –

[22] THE COURT: WHAT WE ARE DEALING WITH SINCE WE ARE DEALING WITH THIS ONE ELEMENT? THE QUESTION WOULD BE WHETHER THE RECORD AS A WHOLE SHOWS THAT EITHER THAT INFORMATION WAS COMMUNICATED TO THE DEFENDANT, OR HE ALREADY KNEW IN SOME OTHER WAY, I PRESUME.

MR. MCCORMICK: I DON'T THINK THAT'S CORRECT, YOUR HONOR. I DON'T THINK THAT IT'S CORRECT THAT THE RECORD AS A WHOLE NEED SHOW THAT ALL THREE OF THOSE ELEMENTS WERE SATISFIED. THE RECORD AS A WHOLE SIMPLY NEEDS TO SHOW THAT THE DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.

IN OTHER WORDS, THE DEFENDANT KNEW HE HAD A RIGHT TO COUNSEL, KNEW THAT BY GOING TO TRIAL HE WAS GIVING UP HIS RIGHT TO COUNSEL, THAT HE DID SO INTELLIGENTLY. THAT IS, THAT HE KNEW WHAT GIVING UP HIS RIGHT TO COUNSEL MEANT.

THE COURT: WELL, BUT ISN'T ONE OF THE REQUIREMENTS OF INTELLIGENTLY QUOTE, UNQUOTE THAT HE KNEW WHAT THE PENALTIES WERE.

MR. MCCORMICK: I DON'T THINK THAT'S THE CASE, YOUR HONOR.

THE COURT: NOW, LET ME SEE IF I CAN FIND THIS PASSAGE. HOLD ON JUST A MOMENT. HOW IS IT – LET'S JUST ASSUME FOR THE PURPOSE OF ARGUMENT FOR JUST A MOMENT THAT THE COURT WOULD NEED TO MAKE A FINDING THAT THE DEFENDANT WAS AWARE OF THE PENALTIES. LET'S JUST ASSUME THAT FOR A MOMENT.

[23] MR. MCCORMICK: OKAY.

THE COURT: IN YOUR – IN YOUR VIEW DOES THE RECORD SHOW THAT THAT WAS THE CASE? THE RECORD DOESN'T SHOW THAT THE JUDGE SPECIFICALLY SAID IT. DOES THE RECORD SHOW IT IN SOME OTHER WAY?

MR. MCCORMICK: THE TRIAL MEMORANDUM FROM THE GOVERNMENT DOES SPECIFY THAT THE PENALTY FOR THE STATUTE WITH WHICH DEFENDANT WAS CHARGED WAS FIVE YEARS, AND THE TRIAL BRIEF ALSO SPECIFIES THAT THE DEFENDANT FACED AT TRIAL FIVE COUNTS OF THAT PARTICULAR OFFENSE.

THE COURT: ALL RIGHT. NOW THAT WAS A TRIAL MEMORANDUM THAT WAS FURNISHED TO THE DEFENDANT AS HIS OWN ATTORNEY; CORRECT?

MR. MCCORMICK: CORRECT.

THE COURT: IN ADDITION TO THAT, IS THERE ANYTHING ELSE?

MR. MCCORMICK: YOUR HONOR, WE HAVE ATTEMPTED TO CONTACT MR. BIENERT – AND WE DID THIS LATE LAST WEEK – TO DISCUSS WITH HIM WHETHER HE HAD POSSIBLY HAD ANY DISCUSSIONS WITH THE DEFENDANT NOW THAT WOULD REQUIRE PROBABLY US TO OBTAIN FROM THE COURT A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE. BUT THAT IS THE ONLY OTHER THING WE COULD THINK OF THAT IS NOT – WE HAVE NOT FULLY EXPLORED. WE CHECKED THE TRANSCRIPT FROM THE DEFENDANT'S POST INDICTMENT ARRAIGNMENT HEARING TO DETERMINE WHETHER HE HAD BEEN ADVISED AT [24] ARRAIGNMENT OF THE MAXIMUM POSSIBLE PENALTY FROM THE TRANSCRIPT AT THE HEARING. IT APPEARS THAT HE WAS NOT. AT THIS POINT I THINK WE HAVE ALL THE TRANSCRIPTS FROM ALL STATUS CONFERENCES AND OTHER HEARINGS IN THIS CASE.

THE COURT: WAS THERE A – WERE THERE PLEA NEGOTIATIONS WITH THE DEFENDANT?

MR. MCCORMICK: THERE WERE PLEA NEGOTIATIONS WITH THE DEFENDANT, BUT I DON'T BELIEVE THOSE WERE EVER REDUCED TO WRITING IN SUCH A WAY THAT HE RECEIVED

A FORMAL WRITTEN PLEA OFFER FROM THE GOVERNMENT.

THE COURT: WAS SENTENCING DISCUSSED – MAXIMUM SENTENCES DISCUSSED IN THOSE MEETINGS?

MR. MCCORMICK: THERE WEREN'T MEETINGS PER SE. I THINK THEY WERE SIMPLY DISCUSSIONS THAT TOOK PLACE BETWEEN EITHER MYSELF OR MR. JULIAN AND EITHER MR. WHITNEY VERY BRIEFLY DIRECTLY OR WITH MR. BIENERT.

THE COURT: JUST CONCERNING MR. BIENERT FOR A MOMENT, I SUPPOSE THAT IF A DEFENDANT SAID I DIDN'T KNOW OF THIS FROM MY SOURCE, AND I NEVER DISCUSSED THIS WITH MY ATTORNEY, I IMAGINE THAT MIGHT WAIVE THE ATTORNEY-CLIENT PRIVILEGE TO CONFIRM WITH THE ATTORNEY WHETHER OR NOT THAT WAS DISCUSSED. SO IT MIGHT WAIVE AT THE – WHY WAS THAT NOT PURSUED? THIS IS SUCH AN IMPORTANT POINT IN THIS MOTION.

MR. MCCORMICK: I – YOUR HONOR, I CONTINUE TO ADD HERE, AS I READ THE CASES – AND I THINK MR. JULIAN AND I

* * *

———

CERTIFICE [sic] OF SERVICE

THE UNDERSIGNED CERTIFIES, that on the **15th** day of September 2008, a copy of the for going Petition was sent via **Federal Express**, for delivery to the United States Court of Appeals for the Ninth Circuit. The undersigned certifies copies for the District Court and the AUSA on service list, were **HAND** delivered also on the **15th** day of September 2008.

Office of The Clerk: United States Court of Appeals
for The Ninth Circuit
95 Seventh Street
San Francisco, CA 94119-3939

Via FedEx

Clerk of The Court: United States District Court
Ronald Reagan Federal Bldg.
411 West Fourth Street
Santa Ana, CA 92701

By: /s/ Michael S. Whitney
Michael S. Whitney
Petitioner/Pro-Se

SERVICE LIST

Mr. Douglas F. McCormick
Mr. Kenneth Julian
Assistant United States Attorney's
Ronald Reagan Federal Bldg.
411 West Fourth Street 8th Floor
Santa Ana, CA 92701

APPENDIX F

MICHAEL S. WHITNEY
8100 PASEO DEL OCASO
LA JOLLA, CA 92037

858-945-7757

Michael S. Whitney
Pro-Se

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL S. WHITNEY, Petitioner, v. UNITED STATES OF AMERICA, Respondent	Case No.: CV-07-260-DOC PETITIONER WHITNEY, REQUEST THIS COURT RECONSIDER ITS ORDED [sic] OF DENIAL OF WHITNEY'S 28 U.S.C. 2255 PETITION. WHITNEY CORRECTLY IDENTIFIES COGNIZABLE CLAIMS THAT REQUIRE A FAIR AND HONEST REVIEW BY THIS HONORABLE COURT. IF THIS COURT DOES NOT GRANT WHITNEY'S REQUEST FOR RECONSIDERATION, WHITNEY REQUEST THIS COURT CONSTRUE THIS MOTION AS A CERTIFICATE OF APPEALIBILITY [sic]

) Hon. David O. Carter
) Sentence imposed under,
) Case No.: CR-00-24-GLT

On March 5, 2007, Petitioner filed a 2255 to vacate, set aside sentence based on ineffective assistance of counsel, district court's abuse of discretion and prosecutorial misconduct. On July 2, 2007 the government filed its opposition to petitioner's 2255. On August 6, 2007 petitioners traverse was filed. On August 8, 2007 in chambers this court issued an order denying petitioner's 2255 petition, said order was filed with the clerk of the court on August 10, 2007.

Whitney is properly requesting this Honorable Court to reconsider its denial of his 2255 petition If this Honorable Court does not grant Whitney's request for reconsideration and hold Evidentiary Hearing's or **Vacate** Whitney's conviction. Whitney request this court construe this Motion as a request for a *Certificate of Appealability.*

Dated: August 20, 2007

Respectfully Submitted,

/s/ Michael S. Whitney
MICHAEL S. WHITNEY
Petitioner/Pro-Se

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I. INTRODUCTION

Whitney properly exhausted all review before filing this instant 2255 Petition. The claim of ineffective assistance of counsel by Whitney's retained counsel of choice Thomas Bienert and David Wiechert is a cognizable claim properly before this court and is deserving of a fair and honest collateral review.

The Circuit Court in its ruling in Whitney's Appeal stated:

> "Whitney also identifies no adverse effect on Bienert's representation."

The adverse effect Whitney suffered from Bienert's representation was ineffective assistance of counsel. Such a claim is barred from review on direct appeal in this Circuit as well as others and must be addressed

in a 28 U.S.C. 2255 Petition See *UNITED STATES v. SIMAS*, 937 F.2d 459, 463 (9th Cir. 1991).

Whitney was not afforded an evidentiary hearing by the trial court instead the court accepted written declarations under the penalty of perjury from Attorney Dean Steward and Whitney's retained counsel of choice Attorney Thomas Bienert. Whitney in his traverse filed on August 6, 2007, fully impeaches Steward and Bienert's declarations made under the penalty of perjury.

Whitney argues the issues in his 2255 petition is not only deserving of collateral review by this Honorable Court, Whitney is in fact deserving of an Evidentiary Hearing as taught in this Circuits standard of review See: *UNITED STATES v. CHANCON-PALOMARES*, 208 F.3d 1157, 1158-59 (9th Cir. 2000) cited in *CHRISTAKIS*,. The United States Supreme Court reversed the districts [sic] court's dismissal of a habeas corpus application because the lower court refused to hold an evidentiary hearing See: *TOWNSEND v. SAIN*, 372 U.S. 293 S. Ct. 745, AL. Ed. 2d 770 (1963).

Whitney's retained counsel Thomas Bienert is no stranger in allowing or creating a situation that may develop into an ineffective assistance claim by his client. See *UNITED STATES v. MILLBERG WEISS BERSHAD & SCHULMAN LLP.*, Case No.: CR 05-587(A)-JFW docket for Jan. 12, 2006. Except for the diligence of the AUSA'S prosecuting the ongoing *MILLBERG*, case, Bienert's disregard for Federal Criminal Rules and Procedures was brought to the

attention of the trial Judge. Bienert represents defendant Lazar in the *MILLBERG,* case the government discovered Bienert had also advised defendant Selzer also in the *MILLBERG,* case. Even though, defendant Lazar subsequently waived his right to new counsel. The government properly argued the position Thomas Bienert should be disqualified from representing defendant Lazar. The Court upon holding a proper hearing ruled Bienert may continue as counsel.

The AUSA'S in the ongoing *MILLBERG,* case understand the position the prosecution is placed in, they not only must prosecute a defendant. The AUSA'S are obligated to insure the protection of a defendant's Constitutional Sixth Amendments [sic] Rights *STRICKLAND,* 466 AT 692 Head-Note [16].

This obligation placed upon the prosecutor is stated with more clarity in *UNITED STATES v. FRADY,* 456 US 152, at 180 71 L.Ed 2d 816, 102 S. Ct. 1584;

> "If the intelligent prosecutor wishes to guard against the possibility of reversible error, he cannot rely on the incompetence or inexperience of his adversary but, on the contrary, must often intervene to protect the defendant from mistakes of counsel."

8B J Moore, Moore's Federal Practice 52.02[2] (1981).

On January 8, 2002 is the bright line or moment Whitney's retain [sic] counsel became ineffective this is the start of Thomas Bienert's ineffective assisitance [sic] as Whitney's counsel. Thomas Bienert failed to

function as Whitney's advocate. Bienert was required to consult with Whitney and keep Whitney informed of important developments in the course of the prosecution. *STRICKLAND,* 466 U.S. 668 at Head-Note [8]. Bienert failed to inform Whitney of the appointment of attorney Ken Miller of Steward & Miller (now of Bienert & Miller as reflected on this court docket.) The AUSA'S were required to bring this situation to the attention of the court as did the AUSA'S in the mentioned *MILLBERG WEISS,* case.

Section 28 U.S.C. 2255 provides four grounds of relief or Cognizable Claims. (1) "That the sentence was imposed in violation of the constitution or laws of the United States; (2) "that the court was without jurisdiction to impose such sentence" (3) "that the sentence was in excess of the maximum authorized by law"; or (4) that the sentence is "otherwise subject to collateral attack."

Whitney asserts and will defend his position, (1) "That the sentence was imposed in violation of the constitution or laws of the United States, and (4) That the sentence is "otherwise subject to collateral attack."

Whitney acknowledges, cognizable claim (2) is not an issue and claim (3) is in fact a debatable issue that is sufficiently preserved, if it requires review by the Ninth Circuit.

II. ARGUMENT

A. This Court In Chambers Order Denying Whitney's 2255 Petition Failed To Address Whitney's Claim Of Ineffective Assistance Of Counsel By His Retained Counsel Thomas H. Bienert And David Wiechert.

Whitney's 2255 Petition filed on March 5, 2007 before this Honorable Court Whitney outlined the "Applicable Law Concerning Ineffective Assistance Of Counsel." See Whitney opening brief P.3.

In his opening brief Whitney outlined how he had met the *STRICKLAND,* test and that his "retained counsel was ineffective and counsel's conduct so undermined the proper functioning of the adversarial process that Whitney's trial cannot be relied on as having produced a just result. See Whitney opening brief P.4.

Whitney further outlined, "The teachings of *STRICKLAND,* Whitney need not prove prejudice, it is presumed, since Whitney was denied actual assistance of counsel altogether at a critical stage his trial." See Whitney opening brief P.9.

Whitney addressed the fact he "was diligent in his search and selection of his counsel of choice. Whitney dutifully was exercising his Sixth Amendment Right to have the assistance of counsel in a criminal prosecution." Whitney cited the following authority:

> "The United States Supreme Court has previously held that an element of this right is the right of a defendant who does not require

> appointed counsel to choose who will represent him. See, *WHEAT v. UNITED STATES*, 486 U.S. 153, 159 (1988) c.f. *POWELL v. ALABAMA*, 287 U.S. 45, 53 (1932)."

See Whitney opening brief P.13

Whitney addressed:

> "The attorney situation was resolved on April 30, 2001 When Whitney executed a retainer agreement with Mr. Thomas Bienert and Mr. David Wiechert. At the July 23, 2001, status conference, Mr. Thomas Bienert Appeared before the district court, and he informed the court on the Record: "he had been retained."

See Whitney opening brief P.19

In spite of the properly filed cognizable claim of Whitney's based on ineffective assistance of counsel by his retained counsel Thomas Bienert and David Wiechert, (1) "That the sentence was imposed in violation of the constitution or the laws of the United States."

The government filed its opposition response on July 2, 2007, with a voluminous attachment of exhibits. A review of the governments Table of Authorities reveals *STRICKLAND*, is not cited, a check of the Table of Contents, one notes Ineffective Assistance of Counsel is not even mentioned.

Whitney's petition under 2255 is grounded upon Ineffective Assistance Of Counsel by retained counsel Bienert and Wiechert. The government opposition

appears to attempt to convince this court Whitney's 2255 Petition is based upon a Conflict of Interest Claim. Whitney addressed the government's claim that "Whitney may not relitigate his conflict claim because it was already decided on direct review." See Whitney Response 8/6/07. Whitney argued and cited Supreme Court authority *PRICE v. VINCENT,* 123 S. Ct. 1848, 1852-53 (2003). An issue may be relitigated if a finding is contrary to or an unreasonable application of the Supreme Court's clearly established precedents.

Whitney mentions this because he wishes to preserve the Ninth Circuits [sic] Ruling on the Attorney conflict of interest finding – between Dean Steward and Ken Miller and their relationship.

Whitney reminds this court the attorney conflict of interest finding by the Circuit Court deals with the relationship between Dean Steward and Ken Miller. Whitney has impeached Dean Steward's declaration he submitted under the penalty of perjury, therefore the Circuit Court Ruling was based upon Dean Steward's perjured declaration, this court has the authority to order an evidentiary hearing.

The cognizable issue of ineffective assistance of counsel of Whitney's retained counsel Thomas Bienert and David Wiechert is properly before this court and based on the facts and the record of this case requires an Evidentiary Hearing on the issue.

The Circuit Court continues in their ruling regarding Whitney by stating:

> "Whitney also identifies no adverse effect on Bienert's representation."

UNITED STATES v. WHITNEY, CA. No. 05-50323, 180 Fed. Appx. 670, 2006 WL 1307943 (9th Cir. 2006).

Whitney did not identify any adverse effect on Bienert's representation because Bienert provided ineffective assistance of counsel, such a claim in this Circuit as well as others may not be raised on direct appeal and may only be raised as Whitney has properly done by way of a 28 U.S.C. 2255 Petition.

Whitney's 2255 petition properly addresses a correct cognizable claim and is deserving of a fair and honest collateral review of such claim by this court.

This Circuit instructs that the Ninth Circuit will in fact decline to address ineffective assistance claims on direct appeal because:

> "more appropriate way to pursue this claim is by way of a . . . proceeding" in which "a record may be developed to show what counsel did and resulting prejudice."

UNITED STATES v. SIMAS, 937 F.2d 459, 463 (9th Cir. 1991)

Whitney has demonstrated this Circuit as well as others will not allow a claim of ineffective assistance of counsel to be raised on a direct appeal because the Circuit requires the development of a factual record.

In keeping with the instructions of the Ninth Circuit Whitney request this Court reconsider and **GRANT** an Evidentiary Hearing into Whitney's claim of ineffective assistance of counsel or simply **VACATE** Whitney's conviction based on the government's failure to oppose Whitney's cognizable claim of ineffective assistance of counsel by Whitney's retained counsel Thomas Bienert and David Wiechert.

B. Whitney's De Facto Prosecution Claim Warrants An Evidentiary Hearing Into George Chelius Willful And Deliberate Intention To Obstruct The Orderly Administration Of Justice Of Whitney's Trial, His Actions Triggered A Rule 32 Violation.

Whitney properly raised the George Chelius issue in his 2255 petition. The record is "Fully Developed" the government admits George Chelius involvement was used for the purpose to deny Whitney bail. Not only was Whitney's liberty lost due to Chelius's obstruction of justice Whitney's sentence was enhanced based upon the false, never investigated affidavits submitted to this Honorable Court.

Whitney claims all the affidavits submitted; Dirk Wray, Douglas Denhart, David P. Cimo, Michael D. Brown and Richard Judson are false and deserving of a full and fair hearing. Whitney submits as Exhibit "A" his recent letter of 8/14/07 to the Federal Aviation Administration, Long Beach California FSDO, regarding the status of Summit Jets as a 135 Certificated Air Carrier on March 7, 2003.

Whitney reminds this Honorable Court Whitney's Liberty was lost and his sentenced [sic] enhanced based on the False Affidavits and Chelius direct obstruction of justice. Mr. Richard Judson the President of Summit Jets declaration made under the penalty of perjury declares, on March 7, 2003 Summit Jets was a Certificated Air Carrier (Charter Carrier) under Part 135 of the Federal Air Regulations. See Gov't Response Exhibit "C".

Richard Judson's claim of being a Certificated 135 Air Carrier on March 7, 2003 is not only false, Summit Jets was not a Certificated 135 Air Carrier authorized under the Federal Air Regulations on the dates Whitney chartered the flights of October 26, 2001 and the second flight on October 28, 2001. Whitney has provided evidence Summit Jets was not issued a Part 135 Certificate until December 21, 2001 and the Certificate was voluntarily surrendered according to the FAA, at the latest on October 11, 2002.

The Government and the Probation Office had a duty to investigate all the third party Affidavits before including them in Whitney's "PSR" in violation of Rule 32. Whitney is entitled to an Evidentry [sic] Hearing into the third party Affidavits for Obstruction of The Orderly Administration Of Justice and the harm caused to Whitney by the loss of his Liberty and the enhancement of his sentence.

Whitney argues this Honorable Court has a duty to protect and maintain The Public Trust that is placed in this courts care.

George Chelius clients are in fact a Group Whitney has named The Group of Five; Dirk A. Wray, Maurice J. DeWald, Christofer C. Ashby, Keith Fink esq., and Ken Polin esq.. The Group of Five obstructed justice not based upon a Civil dispute their actions were based upon a foolish attempt to conceal their criminal acts of bankruptcy fraud, deprivation of honest services and mail fraud. The Group of Five has unwittingly tolled limitations on the above mentioned criminal acts. See Whitney docket # 342 date 7/09/2004.

Whitney has continued his quest to hold The Group of Five accountable for their criminal acts. Whitney has provided Special Agent, Mr. Jeff Horner of the Federal Bureau of Investigation 9797 Aero Drive San Diego, CA 92123, with extensive information on The Group of Five. Whitney submits as Exhibit "B" – two letters one from Dr. Harold A. Lancer, M.D., F.A.A.D., dated August 14, 2007 responding to a recent letter from Whitney. The second letter is from Mr. Richard Bertea dated November 13, 2006. The Group of Five defrauded Mr. Bertea out of One Million Dollars. The George Chelieus issue is deserving of an Evidentiary Hearing.

C. Whitney's Claim Of Manifest Injustice By Violation Of Rule 32 Is Properly Raised In His 2255 Petition.

Whitney has outlined earlier the four cognizable claims for grounds of relief under a petition 28 U.S.C. 2255.

A Rule 32 violation falls under cognizable claim number (4). That the sentence was "otherwise subject to collateral attack." This fourth category of 28 U.S.C. 2255 is known as "The catch-all fourth category-includes only assignments of error that reveal 'fundamental defects' which . . . ' result in a complete miscarriage of justice. . . ." *DAVID v. U.S.*, 134 F.3d 470, 474 (1st Cir. 1998) (quoting *HILL v. U.S.*, 368 U.S. 424, 428 (1962)). This Circuit also holds under *U.S. v. GARFIELD,* 987 F.2d 1424, 1428 (9th Cir. 1993)

> "Failure to resolve factual dispute in Petitioner's presentence report, as reguired [sic] by Fed. R. Crim. P. 32(c)(3)(D), is fundamental defect cognizable under 2255."

Whitney has listed a number of factual disputes that were briefed in his response filed on August 6, 2007. Whitney's Rule 32 claims are cognizable in a 2255 petition says both this Circuit and the United States Supreme Court, Whitney is deserving of relief.

D. This Honorable Court's Order Filed On August 10, 2007, Failed To Address Whitney's Sixth Amendment Violation Of Denial Of Counsel by Erroneous Deprivation Of Whitney's Counsel Of Choice.

Whitney has suffered a complete denial of the right to counsel at a critical stage. On January 8, 2002 is the date this Honorable Court erroneously deprived Whitney of his counsel of choice. This is the date the court appointed Ken Miller of Steward & Miller to represent Whitney's codefendant. The failure of the attorney's to advise the court at once "of the possibility" of a conflict, See *HOLLOWAY,* at 485-86, caused the court to erroneously deprive Whitney of his counsel of choice. The prosecution had a duty also to inform the court of the "of the possibility" of a problem *FRADY,* citing Moore's Federal Practice 52.02[2](1981). "A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." *UNITED STATES v. GONZALEZ LOPEZ,* ___ U.S. ___ No.: 05-352, 6/26/06.

Whitney's retained counsel Thomas Bienert and David Wiechert provided ineffective assistance of counsel on January 8, 2002 because they breached the duty of loyalty, to Whitney *STRICKLAND,* and they failed to advise the court "of possibility" of a problem, *HOLLOWAY,*. The ineffective assistance Bienert and Wiechert provided Whitney on January 8, 2002 a year before the trial created "Structural Error" of such a proportion from that date forward the entire framework within which Whtney's [sic]

trial proceeded – denied Whitney of his counsel of choice it also denied Whitney the assistance of counsel for the trial, See *GONZALEZ LOPEZ*,.

Whitney's Sixth Amendment Right to counsel attached on the day Whitney was indicted and was violated on January 8, 2002 when the court appointed Ken Miller of Steward & Miller and when Bienert and Wiechert were ineffective for failing to act as reasonably competent criminal defense attorney's and inform the court at once of the possibility of a problem. Bienert's Declaration under the penalty of perjury is impeached, Whitney's conviction should be vacated.

III. CONCLUSION

Whitney has followed the instructions of the Ninth Circuit Court and raised his cognizable claim of Ineffective Assistance of his retained Counsel Mr. Thomas Bienert and Mr. David Wiechert by way of 28 U.S.C. 2255 Petition. Whitney is entitled to a fair and honest collateral review before this Honorable Court, of the issue's Whitney has presented and is deserving of an Evidentiary Hearing, See *TOWNSEND*, 372 U.S. at 322.

If this Honorable Court does not Grant Whitney's request for Reconsideration, Whitney request this

Honorable Court construe this Motion as request for **Certificate Of Appealibility** [sic] by Petitioner Whitney.

August 21, 2007

Respectfully Submitted,

/s/ Michael S. Whitney
Michael S. Whitney
Petitioner/Pro-Se

EXHIBIT "A"

Whitney Group, LLC
8100 Paseo Del Ocaso
La Jolla, CA 92037
858-945-7757

August 14, 2007

Federal Aviation Administration
Mr. Lackey
Director Of Operation
5001 Airport Plaza Drive, Suite 100
Long Beach, CA 90815
(562) 420-1755 ex 131

8620 6259 3937
via Fed Ex

Re: Whitney Group, LLC., written request of August 8, 2007, of Summit Jets status as a FAA – Part 135 Air Carrier on March 7, 2003.

Mr. Lackey,

Thank you, for the prompt response to my above mentioned letter addressed to Ms. Linda Silvertooth, Manager of the FAA's Long Beach California, FSDO.

As stated in my August 8, 2007 letter; "On March 7, 2003 Summit Jets made the representation that they were in fact a Certificated Air Carrier (Charter Carrier) under Part 135 of the Federal Air Regulations. Operating out of SNA – Signature, FBO. Address: 19301 Campus Drive, Suite 151 Newport Beach, California 92660."

Per our phone conversation of today (August 14, 2007) you reviewed the FAA, data base my understanding of the FAA, computer records are as follow [sic];

a. Summit Jets was issued a Part 135 Charter Carrier Certificate – **SIIA004P** – on December 21, 2001, for operation out of SNA – Signature, Address: 19301 Campus Drive, Suite 151 Newport Beach, CA 92660.

b. Summit Jets voluntarily surrendered Certificate **SIIA004P**, as a Part 135 FAA, Air Carrier, sometime in 2001, or at the latest on October 11, 2002.

c. Summit Jets was in fact "not" a Part 135 FAA Certificated Air Carrier on March 7, 2003.

As requested please respond in writing as to my understanding of the correctness concerning the above information you provided this morning (August 14, 2007). The above information is based on your review of the FAA's data base.

Respectfully,

Michael S. Whitney
Managing Partner

EXHIBIT "B"

HAROLD A. LANCER, M.D., F.A.A.D.
A MEDICAL CORPORATION
THE PENTHOUSE
9735 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90212

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DIPLOMATE
AMERICAN BOARD OF DERMATOLOGY

ASSISTANT CLINICAL PROFESSOR
UCLA SCHOOL OF MEDICINE

August 14, 2007

Mr. Michael Whitney
Whitney Group, LLC
8100 Paseo Del Ocaso
La Jolla, CA 92037

Mr. Whitney,

Thank you for your letter dated August 9, 2007. The business scam cost $300,000.00. The various members of the group never contacted me and there is no settlement agreement. If it's possible to pursue them aggressively, do so.

Sincerely,

/s/ Harold A. Lancer
HAROLD A. LANCER, M.D., F.A.A.D.

RICHARD BERTEA

[Handwritten Letter]

Dear Michael Nov 13 06

Thanks for your letter of Nov. 1st responding to Eric Benink's epistle? Yes, I'm disappointed – he gave excuses for timing and effort. We all thought the ownership of technology was a blatant issue – guess Benink was too busy with big fish!? I don't plan to invest further – Benink didn't use all of the six hours? Was hoping your situation was to see light way back, but glad you think its close? – love your "starch" to shoot back at these scoundrels!

Best and hope soon for you!

Dick

P.S. You sound like a Marine!

369 SAN MIGUEL DRIVE, SUITE 300 TEL. 949-640-1982
NEWPORT BEACH, CA 92660 FAX 949-640-0862

CERTIFICATE OF DELIVERY BY FED EX

THE UNDERSIGNED CERTIFIES, that on the **22,** day of August 2007, a copy of the foregoing motion was sent: Priority Overnite – via FedEx.

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Ronald Reagan Federal Bldg.
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Santa Ana, California 92701

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By: /s/ Michael S. Whitney
Michael S. Whitney
Petitioner/Pro-Se

SERVICE LIST

Mr. Douglas F. McCormick
Mr. Kenneth Julian
Assistant United States Attorney's
Ronald Reagan Federal Bldg.
Santa Ana, California 92701

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APPENDIX G

THE STATE BAR OF CALIFORNIA

Thursday, January 15, 2009

ATTORNEY SEARCH

Thomas Henry Bienert Jr – #135311

Current Status: Active

This member is active and may practice law in California.

See below for more details.

Profile Information

Bar Number	135311
Address	Bienert & Miller 115 Avenida Miramar San Clemente, CA 92672
District	District 8
County	Orange
Sections	None
Phone Number	(949) 369-3700
Fax Number	(949) 369-3701
e-mail	tom@bmattorneys.com
Undergraduate School	See Registration Card;
Law School	Tulane Univ Law School; New Orleans LA

Status History

Effective Date	Status Change
Present	Active
4/27/1988	Admitted to The State Bar of California

Explanation of member status

Actions Affecting Eligibility to Practice Law

Disciplinary and Related Actions

This member has no public record of discipline.

Administrative Actions

This member has no public record of administrative actions.

THE STATE BAR OF CALIFORNIA

Thursday, January 15, 2009

ATTORNEY SEARCH

Kenneth Morley Miller – #151874

Current Status: Active

This member is active and may practice law in California.

See below for more details.

Profile Information

Bar Number	151874
Address	Bienert & Miller 115 Avenida Miramar San Clemente, CA 92672
District	District 8
County	Orange
Sections	None
Phone Number	(949) 369-3700
Fax Number	(949) 369-3701
e-mail	ken@bnklaw.com
Undergraduate School	Univ of Texas; Austin TX
Law School	Loyola Law School; Los Angeles CA

Status History

Effective Date	Status Change
Present	Active
12/6/1990	Admitted to The State Bar of California

Explanation of member status

Actions Affecting Eligibility to Practice Law

Disciplinary and Related Actions

This member has no public record of discipline.

Administrative Actions

This member has no public record of administrative actions.

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL SYLVESTER WHITNEY, Defendant-Appellant.	No. 05-50323 D.C. No. CR-00-00024-GLT-3 MEMORANDUM* (Filed May 12, 2006)

Appeal from the United States District Court for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted April 4, 2006**
Pasadena, California

Before: FARRIS, FERNANDEZ, and THOMAS, Circuit Judges.

A. Waiver of Counsel

Whitney claims that in order for a waiver to comply with the Sixth Amendment, the district court

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

must find that a defendant has knowledge of three subjects: the

* * *

E. Attorney Conflict of Interest

An actual conflict is one "*that affected counsel's performance* – as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor,* 535 U.S. 162, 171 (2002). The Court reviews such claims de novo. *Lambert v. Blodgett,* 393 F.3d 943, 985 (9th Cir. 2004).

The Government initially argues that there can be no finding of inadequate assistance of counsel if we hold that Whitney waived his right to counsel; that once the Sixth Amendment is waived, it cannot be violated. *Cf. Robinson v. Ignacio,* 360 F.3d 1044, 1056 (9th Cir. 2004).

The Government's argument is unpersuasive. Counsel must meet constitutional requirements prior to a defendant's waiver if the Sixth Amendment has attached. *Cf. Robinson,* 360 F.3d at 1059 (holding that Constitution protected right to counsel at sentencing even where it was waived at trial).

Whitney points to two conflicts. First, he claims that Attorney Stewart, who acted on special appointment at his special appearance and bail hearing, later became partners with Attorney Miller. In turn, Miller later was appointed counsel for co-defendant Hudson. Hudson and Whitney blamed each other, so Whitney

contends that the partnership could not represent both without conflict.

Whitney's claim fails. Stewart faced no conflicts at the time he made his appearance, because he was not yet associated with Miller. Stewart also testified that Whitney understood that Stewart was not his attorney, and that Stewart had received no confidential information. Furthermore, Whitney does not demonstrate any adverse effect.[1]

Whitney claims that Bienert, Miller, Stewart, and a fourth lawyer, Wiechert, were effectively law associates because their offices were adjacent, they shared a paralegal, and they sought to buy a building together. However, merely sharing office space does not establish joint representation for Sixth Amendment purposes. *See Lambert,* 393 F.3d at 986-87. Whitney also identifies no adverse effect on Bienert's representation. Whitney mentions the possibility that Bienert's advice could have been tainted, but "a mere theoretical division of loyalties" does not show a violation. *Mickens,* 535 U.S. at 171.

F. Guidelines

"[We] review[ ] the district court's interpretation of the Sentencing Guidelines de novo, the district

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[1] While Whitney claims that the court, upon appointing Miller counsel, should have made a Federal Rule of Criminal Procedure 44(c) inquiry, he fails to analyze what effect a failure to inquire would have on the Sixth Amendment.

court's application of the Sentencing Guidelines to the facts of this case for abuse of discretion, and the district court's factual findings for clear error." *United States v. Menyweather*, 431 F.3d 692, 697 (9th Cir. 2005) (citation omitted).

The district court applied U.S.S.G. § 1B1.3(a)(1) (Nov. 1995) to hold Whitney accountable for all of the losses that occurred after Whitney joined The Ostrich Group (a total of $567,767). This provision provides that a defendant is responsible for:

* * *